Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1995

Norfolk And Western Railway Company
and Norfolk Southern Corporation
Petitioners

v.

Roosevelt Cerney
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

FORREST A. NORMAN, JR.
Counsel of Record
JAY CLINTON RICE
Gallagher, Sharp, Fulton & Norman
1501 Euclid Avenue, 7th Floor
Cleveland, Ohio 44115
Telephone 216-241-5310
Fax 216-241-1608

Attorneys for Petitioners

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO 216-621-5647

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I

QUESTIONS PRESENTED

1. May the courts of Ohio or any other state substitute a procedural rule for its state's savings statute to circumvent the United States Supreme Court decision set forth in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which held that the Ohio savings statute does not apply to FELA actions?

2. Does the application of variant state procedural rules governing relief from judgment defeat the congressional intent of a federal limitation provision designed to produce national uniformity in the operation of the FELA?

3. Did the Ohio Supreme Court err in declining to hear this case "as not involving a substantial constitutional question" where the courts below permitted relief from judgment under Ohio Civ. R. 60(B) to reinstate plaintiff's FELA action (two years after judgment and six years after his accident) in contravention of federal law, the Supremacy Clause of the United States Constitution, and United States Supreme Court precedent set forth in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965)?

II

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATE RELATIONSHIP

Name and State of Incorporation of Subsidiaries of Norfolk Southern Corporation as of March 1, 1995

Agency Media Services, Inc., Indiana

Atlantic Investment Company, Delaware

Larmbert's Point Barge Company, Inc., Virginia

Norfolk Southern Properties, Inc., Virginia

Norfolk Southern Railway Company, Virginia

North American Van Lines, Inc., Delaware

NS Crown Services, Inc., Virginia

NS Fiber Optics, Inc., Virginia

NS Transportation Brokerage Corporation, Virginia

Pocahontas Development Corporation, Kentucky

Pocahontas Land Corporation, Virginia

TCS Leasing, Inc., Oklahoma

Norfolk Southern Railway Company subsidiaries:

Airforce Pipeline, Inc., North Carolina

Alabama Great Southern Railroad Company, The Alabama Atlanta and Charlotte Air Line Railway Company, The Georgia North Carolina, South Carolina

Atlantic and East Carolina Railway Company, North Carolina

Camp Lejeune Railroad Company, North Carolina

Central Georgia Railroad Company, Georgia

Chesapeake Western Railway, Virginia

Cincinnati, New Orleans and Texas Pacific Railway Company, The, Ohio

Citico Realty Company, Virginia

Elberton Southern Railway Company, Georgia

Georgia Midland Railway Company, The

Georgia Southern and Florida Railway Company, Georgia

High Point, Randleman, Asheboro and Southern Railroad Company, North Carolina

Interstate Railroad Company, Virginia

Memphis and Charleston Railway Company, Mississippi

Mobile and Birmingham Railroad Company, Alabama

Norfolk and Portsmouth Belt Line Railroad Company, Virginia

Norfolk and Western Railway Company, Virginia

North Carolina Midland Railroad Company, The North Carolina

Shenandoah-Virginia Corporation, Virginia

South Western Rail Road Company, The, Georgia

Southern Rail Terminals, Inc., Georgia

Southern Rail Terminals of North Carolina, Inc., North Carolina

Southern Railway-Carolina Division, South Carolina

Southern Region Coal Transport, Inc., Alabama

Southern Region Material Supply, Inc., Georgia

Southern Region Motor Transport, Inc., Georgia

State University Railroad Company, North Carolina

Tennessee, Alabama & Georgia Railway Company, Delaware

Tennessee Railway Company, Tennessee

Toledo Belt Railway Company, The, Ohio

Virginia and Southwestern Railway Company, Virginia

Yadkin Railroad Company, North Carolina

Norfolk Southern Properties, Inc. subsidiaries:

Alexandria-Southern Properties, Inc. Virginia

Arrowood-Southern Company, North Carolina

Arrowood-Southern Executive Park, Inc., North Carolina

Carlyle CA Corporation, Virginia

Carlyle Development Corporation, Virginia

Charlotte-Southern Corporation, North Carolina

Charlotte-Southern Hotel Corporation, North Carolina

Lambert's Point Docks, Incorporated, Virginia

NS-Charlotte Tower Corporation, North Carolina

Nickel Plate Improvement Company, Inc., The; Indiana

Norfolk Southern Industrial Development Corp., Virginia

NS Gas Properties, Inc., Virginia

Sandusky Dock Corporation, Virginia

Southern Region Industrial Realty, Inc., Georgia

Virginia Holding Corporation, Virginia

North American Van Lines, Inc. domestic subsidiaries:

A Five Star Forwarding, Inc., Delaware

A Three Rivers Forwarding, Inc., Indiana

Alaska USA Van Lines, Inc., Indiana

Americas Quality Van Lines, Inc., Indiana

City Storage & Transfer, Inc., Colorado

Fleet Insurance Management, Inc., Indiana

FrontRunner Worldwide, Inc., Delaware

Great Falls North American, Inc., Montana

NACAL, Inc., California

NALOG, Inc., Delaware

NAVTRANS Container Line, Inc., Florida

NAVTRANS International Freight Forwarding, Inc., Indiana

NorAm Forwarding, Inc., Indiana

North American Distribution Systems, Inc., Indiana

North American Forwarding, Inc., Indiana

North American Logistics, Ltd., Indiana

North American Moving & Storage, Inc., Indiana

North American Transport Insurance Co., Indiana

North American Van Lines of Texas, Inc., Texas

Relocation Management Systems, Inc., Delaware

North American Van Lines, Inc., foreign subsidiaries:

Cavalier Moving & Storage Co. Ltd., Canada

Cold Lake Moving & Storage Ltd., Alberta

Curry Moving & Storage, Ltd., Ontario

Midi-Data Speditions GmbH, Germany

NAVPAN, S.A., Panama

NAVTRANS International Speditions GmbH, Germany

North American Van Lines Ltd., United Kingdom

North American Van Lines Canada Ltd., Canada

North American Van Lines (Alberta) Ltd., Alberta

North American Van Lines (Atlantic) Ltd., Nova Scotia

Star Storage Ltd., Manitoba

Tru-Flite Transportation Systems Inc., Canada

Westlake Moving & Storage, Ltd., Ontario

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The "Ruling and Opinion on Defendants' Motion to Dismiss Plaintiff's Cause of Action and Plaintiff's Motion for Declaratory Judgment" (Ruling & Opinion I) in *Roosevelt Cerney v. Norfolk & Western Railway Co., et al.*, Cuyahoga County Common Pleas Court Case No. 256351 was issued on February 15, 1994 and is reprinted in the Appendix at A-1. The trial court granted defendants' motion to dismiss plaintiff's refiled complaint which was time-barred by the three-year statute of limitations, 45 U.S.C. § 56, based upon the authority of the United States Supreme Court in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

The "Ruling and Opinion on Plaintiff's Motion for Relief from Judgment" (Ruling & Opinion II) in *Roosevelt Cerney v. Norfolk and Western Railway Co., et al.*, Cuyahoga County Common Pleas Court Case No. 194859 was issued on July 1, 1994 and is reprinted in the Appendix at A-6. The trial court granted plaintiff's motion for relief from judgment and reinstated his FELA action two years after final judgment and six years after plaintiff's accident.

The "Journal Entry and Opinion" of the Eighth District Court of Appeals, Cuyahoga County, Ohio, in Consolidated Case Nos. 67010 and 67649 affirming the decisions of the trial court was journalized on June 5, 1995 and is reprinted in the Appendix at A-11.

The "Entry" of the Supreme Court of Ohio in *Roosevelt Cerney v. Norfolk & Western Railway Co., et al.*, Case No. 95-1260 declining jurisdiction to hear this case was issued on October 4, 1995 and is reprinted in the Appendix at A-29.

STATEMENT OF JURISDICTION

The Judgment Entry of the Ohio Supreme Court declining jurisdiction was issued on October 4, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

Statement of Constitutional Provisions And Federal Statutes At Issue

This Petition for Writ of Certiorari involves the Supremacy Clause of the United States Constitution and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*

Article VI of the Constitution of the United States of America provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant provision of the FELA concerns the three-year statute of limitations found at 45 U.S.C. § 56, and reads as follows:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

A. Procedural Facts.

Plaintiff Roosevelt Cerney brought this action pursuant to the Federal Employers' Liability Act (FELA), 45 U.S. § 51, *et seq.*, for injuries sustained on August 9, 1988 due to the alleged negligence of the defendants Norfolk and Western Railway Company ("N&W") and Norfolk Southern Corp.[1] The suit was filed in Cuyahoga County Common Pleas Court (Case No. 194859) on August 8, 1990 and then was voluntarily dismissed by plaintiff on August 10, 1992. Plaintiff refiled his Complaint (Case No. 256351) on August 6, 1993, nearly *five years* after his accident.

On September 7, 1993, defendants filed a Motion to Dismiss plaintiff's refiled Complaint based on the three-year statute of limitations applicable to FELA actions. *See* 45 U.S.C. § 56. Ordinarily, Ohio Revised Code § 2305.19 would allow for a voluntary dismissal of a case filed in state court and a subsequent refiling of the complaint within one year if the original statute of limitations had expired. However, the United States Supreme Court has specifically held that the Ohio Savings Statute (O.R.C. § 2305.19) *does not apply to FELA actions. Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

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[1] Plaintiff's Complaint in Case No. 194859 named Norfolk & Southern Corp. as the only defendant. An answer was filed indicating that Norfolk & Western Railway Company was the proper party defendant. Nevertheless, the case proceeded as if both were defendants. Plaintiff's Complaint in Case No. 256351 joined as defendants both N&W and Norfolk Southern Corp.

In Cerney's response, he argued that the defendants should be equitably estopped from asserting the statute of limitations defense. He also filed a Motion for Declaratory Judgment arguing that the trial court's August 27, 1992 Judgment Entry, approving his voluntary dismissal, should be declared void *ab initio* as in conflict with the Supremacy Clause of the United States Constitution.[2]

On February 16, 1994, the trial court denied plaintiff's motion for declaratory relief in Case No. 256351 and held that "the motion of defendant to dismiss is granted and this case is dismissed with prejudice." (Ruling & Opinion I at p. A-3). The trial court correctly observed that plaintiff's Notice of Voluntary Dismissal under Ohio Civ. R. 41(A)(1)(a) was effective the date it was filed (August 10, 1992), and the trial court's subsequent confirmation was of "no legal consequence." *Id.* Plaintiff appealed from the order of dismissal on March 11, 1994 and his appeal was assigned Appellate Case No. 67010.

Meanwhile, on February 25, 1994, plaintiff Cerney filed a "Motion for Relief from Judgment" in Case No. 194859 under Ohio Civ. R. 60(A) and 60(B). This motion represented yet another attack upon plaintiff's

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[2] Federal law preempts Ohio's savings statute ... not plaintiff's right to dismiss his Complaint. Plaintiff's argument that he should have been allowed to dismiss his Complaint under the Ohio savings statute and then refile it one year later on the grounds that his dismissal was void would have achieved the very result prohibited by the United States Supreme Court.

voluntary dismissal of his own complaint.[3] He should have been barred by *res judicata* from once again challenging binding federal law, United States Supreme Court precedent, and the trial court's recent dismissal of his Complaint in Case No. 256351, under the guise of a Rule 60 motion.[4] Moreover, plaintiff never presented any evidence indicating he had a meritorious claim against the railroad. Nevertheless, the trial court granted plaintiff's motion on July 1, 1994, and reinstated plaintiff's FELA action which had been dismissed almost two years earlier. (Ruling & Opinion II). Defendants filed a Notice of Appeal on July 27, 1994. Defendants' appeal was assigned Appellate Case No. 67649.

On August 22, 1994, Case Nos. 67010 and 67649 were consolidated in the Court of Appeals for briefing, hearing, and disposition.

The Eighth District Court of Appeals affirmed both rulings of the trial court in its opinion journalized on June 5, 1995.

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[3] The evidentiary materials presented to the trial court were identical in Case No. 194859 and Case No. 256351.

[4] The dismissal clearly constituted a final adjudication on the merits. *La Barbera v. Batsch*, 10 Ohio St. 2d 106 (1967). Plaintiff's remedy should have been limited to his appeal in Case No. 67010. Instead, plaintiff returned to the trial court for a third time trying to pursue his FELA action by filing a motion to reinstate the case he had dismissed in August, 1992.

Defendants sought further review of the appellate court's decision in Case No. 67649 and timely filed with the Ohio Supreme Court a Notice of Appeal and corresponding Memorandum in Support of Jurisdiction. On October 4, 1995, the Ohio Supreme Court declined jurisdiction to hear the case.

B. Statement of Facts.

Plaintiff Roosevelt Cerney brought his FELA action on August 8, 1990. During the next two years, plaintiff's attorneys issued interrogatories and a request for production of documents, but otherwise did nothing to prepare for trial notwithstanding court-imposed discovery deadlines issued during the initial November 5, 1990 case management conference.

Plaintiff's attorneys were not prepared for trial at the May 20, 1991 pretrial conference so the case was reset for pretrial on November 18, 1991 and then reset once again for pretrial on March 3, 1992. Plaintiff's attorneys were still not prepared so they filed a motion for continuance of the March 3, 1992 pretrial in order to complete discovery. The court continued the pretrial until July 1, 1992. Trial was set for July 27, 1992. Thereafter, the pretrial was once again continued from July 1, 1992 to July 13, 1992 and then to July 31, 1992 and then again to August 4, 1992. The case was set for trial on August 11, 1992.

Plaintiff's original attorneys associated with new counsel who advised defense counsel that he was going to file a motion for another continuance and inquired whether defense counsel would join in the motion. Defense counsel was prepared to proceed to trial on the scheduled trial date of August 11, 1992

and had, in fact, already made arrangements for the attendance of all witnesses. Thus, defense counsel refused to join in plaintiff's motion, but as a matter of professional courtesy indicated that there would be no opposition to it. On July 23, 1992, plaintiff moved for a continuance of the trial date.

The case proceeded to final pretrial on August 4, 1992. Plaintiff's attorneys never indicated prior to the pretrial that they were considering a voluntary dismissal of plaintiff's Complaint. Thus, defense counsel had no occasion to research the law on the effect of such a dismissal. The court was advised during the August 4, 1992 pretrial conference that defendants were prepared for trial as scheduled. The court then indicated that plaintiff's Motion for a Continuance would not be granted. Plaintiff's attorney advised the court that he would dismiss the case and then refile it. Defendants and their attorney made absolutely no comment on plaintiff's attorneys' proposed dismissal. Plaintiff's attorneys did not seek defendants' consent nor was any approval given. There was no agreement that plaintiff could refile his Complaint. Plaintiff's attorneys filed a "Notice of Voluntary Dismissal" pursuant to Ohio Civil Rule 41, one day before the scheduled trial date. Defense counsel did not sign the dismissal entry nor agree to it.

The trial court judge observed in his Opinion that "[t]here can be no doubt that a central reason for plaintiff's voluntary dismissal was a mistake in judgment by plaintiff's counsel and inadequate preparation by plaintiff's original counsel," that "[p]laintiff's original counsel was not prepared to try

the case on the date set for trial" and that "plaintiff dismissed the case in the mistaken belief that the Ohio savings statute would permit refiling within a year." (Ruling & Opinion II at p. A-8). The trial court judge held that,

> "... this Court's suggestion that Mr. Cerney might be able to voluntarily dismiss his case and refile it within a year provides no basis for any equitable relief. The Court's suggestion was just that, and Mr. Cerney must bear the ultimate responsibility for his decision to voluntarily dismiss his case rather than go to trial at the time set by the Court."

(Ruling & Opinion I at p. A-3).

The Court of Appeals likewise rejected Cerney's equitable estoppel argument, reasoning as follows:

> The parties stipulated that Norfolk's attorney neither acquiesced in nor objected to the suggestion Cerney could dismiss his case and refile within one year. ... Cerney can point to no affirmative statement, representations, conduct, or promises on the part of Norfolk which induced him to voluntarily dismiss his case. Further, Norfolk could not consent to the judgment entry as the dismissal was effective at the point Cerney filed his notice of dismissal not when the judgment was entered. Civ. R. 41(A)(1).

Court of Appeals' Opinion at p. A-16.

In affirming the trial court's dismissal of plaintiff's complaint, the Court of Appeals held as follows in Case No. 67010:

> The specific language of the *Burnett* opinion does not allow the use of saving statutes to extend the time in which an action may be brought. The court quotes the holding of *Engel* to underscore the need for uniformity in the period of time in which suit can be brought. The *Burnett* court affirmatively rejected the use of saving statutes in FELA actions.
>
> The trial court did not err by failing to toll the time by use of the savings statute in the instant case.

Court of Appeals' Opinion at p. A-18.

Thus, the Court of Appeals acknowledged that federal law preempts Ohio's savings statute and that plaintiff's refiled complaint had to be dismissed based on the three-year statute of limitations found in 45 U.S.C. § 56. The same appellate court in Consolidated Case No. 67649, however, affirmed relief from judgment under Ohio Civ. R. 60(B)(5) and achieved the very result *prohibited* by the United States Supreme Court in *Burnett*!

In reinstating plaintiff's Complaint, under Ohio Civ. R. 60B(5),[5] the Cuyahoga County Court of Appeals reasoned that,

> "In the instant case, no one anticipated prior to the pretrial hearing that Cerney might file a notice of voluntary dismissal. Neither the trial court nor either party was aware of the effect such a dismissal would have on the case. The result of the dismissal was the end of the suit under *Burnett*. There was no intention on the part of Cerney to circumvent the statute of limitations."

(Court of Appeals Opinion at p. A-23). Does this mean the statute of limitations under the FELA is applicable only when a plaintiff has intentionally filed late?

Simply stated, the three-year statute of limitations found in 45 U.S.C. § 56 and the United States Supreme Court decision in Burnett, prohibiting resort to the Ohio savings statute, have been rendered a nullity by the courts of Ohio.

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[5] The Ohio appellate court recognized that it was too late to grant relief from judgment under Rule 60(B)(1) for "excusable neglect."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Supreme Court should grant this petition for a writ of certiorari for one very simple reason: The decisions of the Ohio courts represent a direct challenge to this Court's decision in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

Plaintiff refiled his FELA action in express reliance upon the Ohio savings statute. The highest court of this nation has held that Ohio's savings statute does not apply to FELA actions. The Ohio courts simply substituted Civ. R. 60(B) for the savings statute to defeat application of controlling federal law and United States Supreme Court precedent.

Thirty years ago, the United States Supreme Court granted certiorari to determine whether the compelling national interest of achieving uniformity in the operation of the FELA could be defeated by application of Ohio's savings statute. The same compelling reason for further review is presented in this case.

A. The Statute of Limitations Applicable to an FELA Action is Governed by Federal Law. 45 U.S.C. § 56. A Trial Court May Not Grant Relief from Judgment under Ohio Civ. R. 60(B) to Reinstate Plaintiff's FELA Action, Two Years After Judgment and Six Years After His Accident, in Contravention of Federal Law, the Supremacy Clause of the United States Constitution, and United States Supreme Court Precedent. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

The Federal Employers' Liability Act states that, "No action shall be maintained under this Act ... unless commenced within three years from the date the cause of action accrued." 45 U.S.C. § 56. Where a federally created cause of action is filed in state court, the state court is obligated to abide by the applicable federal period of limitation. *See generally*, 51 Am. Jur. 2d *Limitation of Actions* § 375 (1970).

Plaintiff's first Complaint was filed on August 10, 1990 which was within the limitation period since the injury from which the cause of action arose occurred on August 9, 1988. Plaintiff's prosecution and then voluntary dismissal of his FELA action two years later, on August 10, 1992 did not interrupt the running of the statute. It is a well established principle of federal law that the entry of voluntary dismissal without prejudice leaves the action *as if suit had never been brought* for the purposes of the statute of limitations. *See, e.g., Curtis v. United Transportation Union*, 648 F.2d 492 (8th Cir. 1981); *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26, 28 (6th Cir. 1987); *Hall v. Kroger Baking Co.*, 520 F.2d 1204, 1205 (6th Cir. 1975) citing *Bomer v. Ribicoff*, 304 F.2d

427, 428-29 (6th Cir. 1962); *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191, 1194 (8th Cir. 1976); *Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1027 (9th Cir. 1975). Nevertheless, plaintiff subsequently refiled his Complaint on August 6, 1993, *nearly five years after his injury*, relying upon the Ohio Savings Statute.

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The laws of the state are preempted by federal law where Congress has enacted a federal regulatory scheme intended to supersede state law. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). The United States Supreme Court in *Burnett* found that Congress had enacted such a regulatory scheme in the FELA and specifically held that *the Ohio Savings Statute does not apply to FELA actions.*

> *This does not mean that we can accept petitioner's argument that the federal limitation provision incorporates the Ohio Savings Statute.* To allow the limitation provision to incorporate state saving statutes would produce nonuniform periods of limitation in the several States. The scope of such statutes and the length of additional time they allow vary considerably from State to State. Moreover, not all States have saving statutes. *This Court has long recognized that the FELA "has a uniform operation, and*

> *neither is nor can be deflected therefrom by local statutes." Panama R. Co. v. Johnson*, 264 U.S. 375, 392; *Second Employers' Liability Cases*, 223 U.S. 1, 51, 55. This Court has also specifically held that *"[t]he period of time within which an action may be commenced is a material element in...[a] uniformity of operation" which Congress would not wish "to be destroyed by the varying provisions of the state statutes of limitations." Engel v. Davenport*, 271 U.S. 33, 39. *The incorporation of variant state saving statutes would defeat the aim of a federal limitation provision designed to produce national uniformity.* (Emphasis added).

Id. at 433. In the case at bar, the United States Supreme Court decision in *Burnett* prohibiting resort to Ohio's savings statute has been circumvented under the pretext of another Ohio procedural rule.

The strong federal policy of uniformity underlying federal statutes has been held to preclude application of a state savings statute to *other* federally-created claims. *See, e.g., Davis v. Smith's Transfer, Inc.*, 841 F.2d 139 (6th Cir. 1988) (the court held that the employee's voluntary dismissal of his "hybrid" suit under the Labor Management Relations Act did not toll the continuous running of the statute of limitations, and Tennessee's savings statute could not be applied to permit refiling after expiration of the six-month statute of limitations); *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), *aff'd*, 421 U.S. 454 (1975) (the court refused to apply a state savings statute to extend the time for filing an

action under Title VII of the Civil Rights Act). Plaintiff Cerney has no greater basis for being spared the dismissal of his FELA action based on the statute of limitations than any other plaintiff who has failed to timely prosecute his action in compliance with federal law.

B. The Application of Variant State Procedural Rules and Case Law Governing Relief from Judgment Would Defeat the Congressional Aim of a Uniform Operation of the FELA.

The United States Supreme Court "has long recognized that the FELA has a uniform operation" and that "the incorporation of variant state savings statutes would defeat the aim of a federal limitation provision designed to produce national uniformity." *Burnett* at 433.

The Ohio courts acknowledged that plaintiff Cerney dismissed his FELA action and then refiled it (five years after his accident) in reliance upon the savings statute (Court of Appeals Opinion at p. A-15). To circumvent Supreme Court precedent, the trial court merely reinstated plaintiff's original action under Ohio Civil Rule 60(B)(5). The court of appeals approved of this subterfuge holding that "the trial court did not abuse its *discretion* in rectifying the dismissal in the interests of justice." (Court of Appeals Opinion at p. A-23). (Emphasis added).

It is precisely this exercise of "discretion" by a trial court which the Supreme Court found to be at variance with the policies of certainty and uniformity underlying the FELA statute of limitations.

> The period "saved" under such statutes varies widely among the States, and some States do not have "saving" statutes. Similarly, to toll the federal statute for a "reasonable time" after the state court orders the plaintiff's action dismissed would create uncertainty as to exactly when the limitation period again begins to run. This uncertainty would be compounded by applying the equitable doctrine of "laches" to the federal lawsuit brought after the dismissal of the state court action. Whether laches bars an action in a given case depends upon the circumstances of that case and "is a question *primarily addressed to the discretion of the trial court.*" *Gardner v. Panama R. Co.*, 342 U.S. 29, 30. *To apply it here would be at variance* with the policies of certainty and *uniformity underlying the statute of limitations. Id.* at 424. (Emphasis added).

The classification of Rule 60(B)(5) as "'procedural' does not determine whether or under what circumstances the limitation provision may be extended." *Id.* at 426-427. The *Burnett* court recognized that "the 'substantive' — 'procedural' distinction would seem to be of little help in deciding questions of extending this limitation period." *Id.* at 427 n. 2. Moreover, not all states have the same "procedural" rules governing relief from judgment.[6] This inconsistency among the states was one of the

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[6] *See*, Appendix A-30 through A-151 for the texts of state procedural rules regarding relief from judgment.

key concerns of this Court in rejecting the incorporation of variant state savings statutes into the FELA.

For example, many states have modeled their relief from judgment rules after Rule 60 of the Federal Rules of Civil Procedure.[7] However, very few states have adopted the exact language of Federal Rule 60.

Specifically, Federal Rule 60(b) provides that the motion for relief shall be made "within a reasonable

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[7] *See*, **Alabama**: ARCP, Rule 60; **Alaska**: Alaska R. Civ. Proc. 60; **Arizona**: Ariz. St RCP R. 60; **Arkansas**: ARCP Rule 60; **Colorado**: C.R.C.P. 60; **Delaware**: Del. Super. Ct. Civ. R. 60; **Florida**: Fla. R. Civ. P. 1.540; **Hawaii**: HRCP, Rule 60; **Idaho**: I.R.C.P. 60 (a) (b); **Indiana**: Burns Ind. Tr. 60; **Kansas**: K.S.A. § 60-260; **Kentucky**: Ky CR 60.01 and 60.02; **Maine**: ME R RCP Rule 60; **Massachusetts**: ALM Rules Civ. P. 60; **Michigan**: MSA Rule 2.612; NCR 2.612; **Minnesota**: Minn. Dist. Ct. Gen. Rule 60.01 and 60.02; **Mississippi**: M.R.C.P. 60; **Missouri**: S. Ct. Rule 74.06 R.S.Mo.; **Montana**: Mont. Code Anno., Ch. 20, Rule 60(a), (b), (c); **Nevada**: Nev. R.C.P. 60; **New Jersey**: N.J. Court Rules, 1969 R. 4:50-1 and 4:50-2; **New Mexico**: N.M. Dist. Ct. R.C.P. 1-060; **North Carolina**: N.C. Gen. Stat. @ 1A-1, Rule 60; **North Dakota**: N.D.R. Civ. P. Rule 60; **Ohio**: OH Civ. R. 60; **Oregon**: ORCP 71; **Rhode Island**: RI R.C.P. 60; **South Carolina**: S.C. Rules of Civil Procedure 60; **South Dakota**: S.D. Codified Laws § 15-6-60(a) and (b); **Tennessee**: Tenn. Civ. Proc. Rule 60; **Utah**: URCP Rule 60; **Vermont**: V.R.C.P. 60; **Washington**: Wash. CR 60; **West Virginia**: WVa. R.C.P., Rule 60; **Wisconsin**: Wis. Stat. @ 806.07; **Wyoming**: W.R.C.P., Rule 60.

time," except when the grounds for relief are mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation or other misconduct of an adverse party. In such instances, the motion must be made not more than one year after the judgment or order was entered. In states where the grounds for relief are virtually identical to the federal rule, many have set forth different time limits in which a motion for relief must be made.[8] Other states have set forth different grounds for relief under their comparable civil rule.[9] Still other states have imposed time limits as in the Federal Rules, but not for the same grounds.[10]

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[8] *See*, Alabama (4 months); Arizona (6 months); Colorado (6 months); Idaho (6 months); Mississippi (6 months); Montana (60 days or 180 days depending on whether defendant has been served); Nevada (6 months); Utah (3 months); West Virginia (8 months).

[9] *See, e.g.*, **Arkansas**: ARCP Rule 60; **Colorado**: C.R.C.P. 60; **Florida**: Fla. R. Civ. P. 1.540; **Indiana**: Burns Ind. TR. 60; **Kentucky**: Ky CR 60.01 and 60.02; **Mississippi**: M.R.C.P. 60; **Missouri**: S. Ct. Rule 74.06 R.S.Mo.; **Nevada**: Nev. R.C.P. 60; **Ohio**: OH Civ. R. 60; **Oregon**: ORCP 71; **South Carolina**: S.C. Rules of Civil Procedure 60; **Tennessee**: Tenn. Civ. Proc. Rule 60; **Utah**: URCP Rule 60; **Washington**: Wash. CR 60.

[10] Colorado, Idaho, Indiana, Kentucky, Missouri, Nevada, Tennessee, Utah, and West Virginia.

It also must be noted that many states have adopted relief from judgment rules having *no similarity* whatsoever to Federal Rule 60.[11] The text of these rules is not only different from Federal Rule 60, but the grounds for relief vary dramatically. The time limits of these rules pursuant to which a motion for relief must be made also differ significantly from Federal Rule 60.[12]

Finally, case law interpreting these procedural rules will obviously differ in each state. Indeed, the Ohio appellate court's interpretation of Civil Rule 60(B)(5) conflicts with this Court's interpretation of the corresponding Federal Civil Rule 60(b)(6).

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[11] *See*, **California**: Cal Code Civ Proc @ 657 and 659; **Connecticut**: Conn. Gen. Stat. @ 52-212, 212A, 228, 228b; **Georgia**: O.C.G.A. @ 9-11-60; **Illinois**: 735 ILCS 5/2-1301, 5/2-1401; **Iowa**: Iowa Code @ 624A.1-A.3; **Louisiana**: La. C.C.P. art. 1951, 2001-2006; **Maryland**: Md. Rule 2-535; **Nebraska**: R.R.S. Neb. § 25-2001; **New York**: NY CLS CPLR R 5015; **Oklahoma**: 12 Okl. St. @ 1031, 1031.1, 1032, 1033, 1038; **Pennsylvania**: PA ST RPC Rule 227.1; **Texas**: TX RCP Rule 316, 320, 321, 322, 329b; **Virginia**: Va. Code Ann. @ 8.01-428.

[12] *See*, California (6 months); Connecticut (4 months); Georgia (up to 3 years); Illinois (up to 2 years); Louisiana (unlimited for some grounds); Maryland (30 days); Oklahoma (up to 3 years); Texas (75 days); Virginia (unlimited for some grounds).

The United States Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), held that relief from judgment under the analogous Federal Civ. R. 60(b)(6) was appropriate where the trial court judge presiding over a bench trial had an undisclosed conflict of interest mandating his disqualification under 28 U.S.C. § 455(a). However, the Supreme Court's opinion makes it quite clear that relief from judgment would *not be permitted* to circumvent the one-year limitations period applicable to 60(b)(1) in cases of excusable neglect. The United States Supreme Court reasoned as follows:

> "In *Klapprott v. United States*, 335 U.S. 601, 613 (1949), we held that a party may "not avail himself of the broad 'any other reason' clause of 60(b)" if his motion is based on grounds specified in clause (1)--"mistake, inadvertence, surprise, or excusable neglect." *Rather, "extraordinary circumstances" are required to bring the motion within the "other reason" language and to prevent clause (6) from being used to circumvent the 1-year limitations period that applies to clause (1). This logic, of course, extends beyond clause (1) and suggests that clause (6) and clauses (1) through (5) are mutually exclusive.* See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864 (1973). We conclude that the basis for relief in this case is extraordinary and that the motion was thus proper under clause (6). See *infra*, at 865-867.

Liljeberg, *supra*, at 863, n. 11 (emphasis added).[13]

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[13] Federal courts have unanimously concluded that a party cannot circumvent the one-year limitation by characterizing his motion as falling within the general catch-all provision. *Great Coastal Express, Inc. v. International Brotherhood of Teamsters, Etc.*, 675 F.2d 1349, 1355 (4th Cir. 1982); *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 836-37, n. 8 (5th Cir. 1980); *Alling v. American Tool & Grinding Co.*, 101 F.R.D. 364, 365 (D. Colo. 1984). The following discussion found in *Brown v. Burnside*, 109 F.R.D. 412 (E.D. N.Y. 1986), is particularly relevant to the case at bar.

> It is well settled that a case cannot fall within both Rule 60(b)(1) and Rule 60(b)(6). *See Matter of Emergency Beacon Corp.*, 666 F.2d 754, 758 (2d Cir. 1981); *U.S. v. Erdoss*, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849, 92 S.Ct. 83, 30 L.Ed. 2d 88 (1971); C Wright, A. Miller & F. Elliot, *Federal Practice and Procedure* § 2864, at 216-18. In other words, the provisions are mutually exclusive: if a case falls within Rule 60(b)(1), a party cannot avoid the one-year limit by characterizing it as falling within Rule 60(b)(6).
>
> "A quite typical kind of case [in which this problem arises] is that in which a party comes in more than a year after judgment to assert that he is the victim of some blunder by his counsel." C Wright, A. Miller & F. Elliot, *Federal Practice and Procedure*, § 2864, at 221-22. These cases fit within the mistake, inadvertence, and excusable neglect grounds of Rule 60(b)(1). *See, e.g., Hawkins v. Lindsley*, 327 F.2d 356, 358 (2d Cir. 1964) (neglect of plaintiff's attorney); *Costa v. Chapkines*, 316 F.2d 541, 542 (2d Cir. 1963) (dismissal for want of prosecution); *McCawley v. Fleischmann Transp. Co.*, 10 F.R.D. 624, 625 (S.D. N.Y. 1951) (dismissal for failure of plaintiff to proceed with case); *see also* C. Wright, A. Miller & F. Elliot, *Federal Practice and Procedure* § 2864, at 222 ("Claims of this kind seem to fit readily enough within [the grounds of Rule 60(b)(1),] and courts frequently have so reasoned and held that [Rule 60(b)(6)] was inapplicable.").

Id. at 413-414.

This Court further observed that "[O]f particular importance, this is not a case involving neglect or lack of due diligence by respondent." *Id.*

In the case at bar, the trial court determined that "[t]here can be no doubt that a central reason for plaintiff's voluntary dismissal was a mistake in judgment by plaintiff's counsel and inadequate preparation by plaintiff's original counsel." (Ruling & Opinion II at p. A-8). The court further found that "counsel for plaintiff dismissed the case in the mistaken belief that the Ohio savings statute would permit refiling within a year." *Id.* at A-8. These specific findings of the trial court set forth the basis for a motion under either Ohio Civil Rule 60(B)(1) or its federal counterpart for excusable neglect but are irreconcilable with a finding of an "extraordinary circumstance" within the "other reason" language found in Federal Civil Rule 60(b)(6). The Ohio courts, however, felt justified in granting such relief under Ohio Civil Rule 60(B)(5).

CONCLUSION

Ohio has substituted Civ. R. 60(B) for its savings statute to resurrect plaintiff's FELA action in *defiance* of United States Supreme Court precedent. The Ohio courts have once again introduced into the FELA a variant state procedural rule which defeats "the aim of a federal limitation provision designed to produce national uniformity." *Burnett* at 433. These concerns were found compelling by this Court to grant certiorari thirty years ago. They are of no less concern today.

The continued vitality of *stare decisis* has been debated in Ohio. *See Gallimore v. Childrens Hosp. Med. Ctr.*, 67 Ohio St. 3d 244 (1993). There can be no debate, however, that the courts of Ohio are bound to follow the pronouncements of this United States Supreme Court. The United States Supreme Court held in *Reynoldsville Casket Co. v. Hyde*, 131 L. Ed. 2d 820, 1995 U.S. LEXIS 3182, 115 S. Ct. 1745 (U.S. 1995), that "we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy." *Id.* A similar challenge to the Supremacy Clause and this Court's authority has been presented once again by Ohio's courts.

For all of these reasons, petitioners respectfully request that this Court grant a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

Forrest A. Norman, Jr. *(Counsel of Record)*
Jay Clinton Rice
Gallagher, Sharp, Fulton & Norman
Bulkley Building, 7th Floor
1501 Euclid Avenue
Cleveland, Ohio 44115
Telephone 216-241-5310
Telefax 216-241-1608

Attorneys for Petitioners

APPENDIX

STATE OF OHIO	)	IN THE COURT
	) SS:	OF COMMON
CUYAHOGA COUNTY	)	PLEAS
		CASE NO. 256351
ROOSEVELT CERNEY,	)	
	)	
Plaintiff	)	
	)	
v.	)	**RULING AND OPINION**
	)	**ON DEFENDANTS'**
NORFOLK & WESTERN	)	**MOTION TO DISMISS**
RAILWAY COMPANY	)	**PLAINTIFF'S CAUSE**
and NORFOLK	)	**OF ACTION AND**
SOUTHERN CORP.	)	**PLAINTIFF'S MOTION**
	)	**FOR DECLARATORY**
Defendants	)	**JUDGMENT**

Burt W. Griffin, J.:

On August 9, 1988, Mr. Roosevelt Cerney sustained personal injuries while working as an employee of Norfolk and Western Railway Company and Norfolk Southern Corp. (hereinafter "defendants"). As a result, Mr. Cerney initiated an action in Cuyahoga Common Pleas Case No. 256351 against the defendants pursuant to the Federal Employer's Liability Act (hereinafter "FELA"), 45 U.S.C. § 51 *et seq.* on August 10, 1990. He voluntarily dismissed Case No. 256351 on August 10, 1992 pursuant to Civ. R. 41(A)(1). Mr. Cerney refiled his complaint in this case on August 6, 1993. Defendants have moved to dismiss Mr. Cerney's refiled complaint on the grounds that his claim is now time

barred by the FELA's three-year statute of limitations. Plaintiff has moved for Declaratory Judgment on the issue.

Under FELA, § 56 of 45 U.S.C. reads: "No action shall be maintained under this act [45 USCS §§ 51 *et seq.*] unless commenced within three years from the day the cause of action accrued." Mr. Cerney voluntarily dismissed his case four years after his FELA cause of action arose. This decision was made after the Court declined to grant plaintiff a continuance in connection with a trial date. Plaintiff asserts that his decision to dismiss was prompted by this Court's suggesting that, if he could not meet the Court's trial date, he might refile his complaint within a year of its dismissal pursuant to the Ohio Savings Statute O.R.C. § 2305.19.

However, the Supreme Court of the United States has specifically ruled that state savings statutes cannot be applied to the FELA because to do so would defeat the goal of uniform application of federal law:

> This does not mean that we can accept petitioner's argument that the federal limitation provision incorporates the Ohio Savings Statute. To allow the limitation provision to incorporate state savings statutes would produce nonuniform periods of limitation in the several States....This Court has long recognized that the FELA 'has a uniform operation, and neither is nor can be deflected therefrom by local statutes'....The incorporation of variant state saving statutes would defeat the aim of a federal limitation provision designed to produce national uniformity. *Burnett v. New York Centr. Co.* (1965), 380 U.S. 424, 13 L.Ed. 2d 941, 948.

Mr. Cerney concedes that the three-year statute of limitations found in the FELA clearly preempts Ohio's Savings Statute. He has therefore requested that this Court declare its voluntary dismissal judgment entry void thereby mooting both the statute of limitations issue and the defendants' motion to dismiss. He contends that he is entitled to such declaratory relief because of this Court's suggestion that he might voluntarily dismiss his case because the refiling of his action presents no surprise to defendants, and because he interprets the defendants' actions to date as indicating that a real controversy exists between the parties.

Civ.R. 41(A)(1)(a) provides that "...an action may be dismissed by the plaintiff *without order of court* by filing a notice of dismissal at any time before the commencement of trial..." (Emphasis added.) It is clear that voiding this Court's August 27, 1992 judgment entry which confirmed Mr. Cerney's voluntary dismissal of his case would have no legal consequence because Mr. Cerney's case was effectively dismissed on August 10, 1992 when he filed his notice of voluntary dismissal.

In addition, this Court's suggestion that Mr. Cerney might be able to voluntarily dismiss his case and refile within a year provides no basis for any equitable relief. The Court's suggestion was just that, and Mr. Cerney must bear the ultimate responsibility for his decision to voluntarily dismiss his case rather than go to trial at the time set by the Court.

Plaintiff's motion seeking declaratory relief is therefore denied. The motion of defendant to dismiss is granted and this case is dismissed with prejudice. In so doing, the Court does not mean to preclude plaintiff seeking

some other relief from his voluntary dismissal of Case No. 256351 that is consistent with the remedial philosophy of the Federal Employer's Liability Act and the Ohio Rules of Civil Procedure. *See Burnett v. New York Cent. R. Co.*, *supra*, and Rule 60(B), Ohio Rules of Civil Procedure.

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

DATE: February 15, 1994

CERTIFICATE OF SERVICE

A copy of the foregoing **Ruling and Opinion** has been forwarded by regular U.S. Mail this 15th day of February, 1994, to:

Forrest A. Norman, Esq.
Bulkley Building,
7th Floor
1501 Euclid Avenue
Cleveland, Ohio 44115
Attorney for Defendant

Peter H. Weinberger, Esq.
2400 National City Center
1900 East Ninth Street
Cleveland, Ohio 44113-3400
Attorney for Plaintiff

Thomas J. Escovar, Esq.
The Illuminating Building
55 Public Square, 18th Floor
Cleveland, Ohio 44113
Attorney for Plaintiff

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

STATE OF OHIO	)	IN THE COURT OF
	) SS:	COMMON PLEAS
CUYAHOGA COUNTY	)	CASE NO. 194859
ROOSEVELT CERNEY,	)	
	)	
Plaintiff	)	
	)	**RULING AND OPINION**
v.	)	**ON PLAINTIFF'S MOTION**
	)	**FOR RELIEF FROM**
NORFOLK AND	)	**JUDGMENT**
WESTERN RAILWAY	)	
CO., et al.,	)	
	)	
Defendants	)	

Burt W. Griffin. J.:

Plaintiff moves, pursuant to Ohio Civil Rule 60(B)(4) and (5), to vacate the judgment entry of voluntary dismissal dated August 27, 1992 resulting from plaintiff's own notice of voluntary dismissal dated August 10, 1992. The judgment of dismissal provided that the case was dismissed with "intent...to permit plaintiff to refile the matter within one year...." although the dismissal became effective with the filing of the notice of dismissal.

Plaintiff's cause of action allegedly arose on August 9, 1988. He filed his complaint for personal injuries on August 8, 1990.

The voluntary dismissal resulted because plaintiff had retained new counsel to try his case; new counsel desired

time for additional discovery; and the Court was unwilling to grant a further continuance beyond the two-year time limit for concluding cases established by the Rules of Superintendence. Such a continuance would have allowed plaintiff's case to retain priority on the Court's docket ahead of cases that had been more diligently prepared.

The parties, counsel, and the Court believed that a voluntary dismissal by plaintiff would allow plaintiff to refile the case within a year and that his case would take its place on the Court's docket behind cases that had been filed earlier than plaintiff's refiling. No one at that time was aware that the Federal Employer's Liability Act precluded refiling because the statute of limitations had expired.. On February 15, 1994, the Court granted defendant's motion to dismiss the refiled case, No. 256351, because of the United States Supreme Court's ruling on the right to refile FELA cases. See Court's opinion, *Roosevelt Cerney v. Norfolk and Western Co., et al.*, Cuyahoga County Common Pleas Court Case No. 256351, unreported Opinion (February 15, 1994). Plaintiff, thereafter, on February 25, 1994, filed this motion to vacate the judgment of dismissal in Case No. 194854.

If any relief is available to plaintiff, it must be under Civil Rule 60(B)(4) or (5). Rule 60(A) *Clerical Mistake* does not apply since the error in this case was an error of judgment by plaintiff's counsel. See *Dentsply International, Inc. v. Kostas*, 26 Ohio App. 3d 116 (Cuyahoga County, 1985); Wright & Miller, *Federal Practice and Procedure*, § 2854, p. 149 (1977). The motion cannot be considered under Rule 60(B)(1), (2) and (3) because it was not filed within the one-year time limit applicable to those subsections.

Whether this motion should be deemed to be governed only by Rule 60(B)(1), (2), (3) and thus be precluded or is cognizable under Rule 60(B)(5) depends on how one views the central facts giving rise to the dismissal. There can be no doubt that a central reason for plaintiff's voluntary dismissal was a mistake in judgment by plaintiff's counsel and inadequate preparation by plaintiff's original counsel.

Plaintiff's original counsel was not prepared to try the case on the date set for trial and secured new counsel for plaintiff. New counsel believed not only that he needed more time for preparation but also that additional discovery was necessary. When the Court would not permit a continuance of trial, counsel for plaintiff dismissed the case in the mistaken belief that the Ohio savings statute would permit refiling within a year. The denial of the continuance was based upon the Court's insistence that the time deadlines of the Rules of Superintendence be observed.

Although inadequate preparation by original counsel was the underlying cause of the need to dismiss, the remaining decisions reflected a desire by plaintiff's counsel to be diligent. None of plaintiff's loss of his right to a trial stems from a judgment about the merits of his case. Rather, issues of court management and lawyer performance have caused him to suffer.

It is not the purpose of the Rules of Superintendence to deny a party a hearing on the merits of his case. Only the most extreme or repeated lawyer misconduct should ordinarily justify a dismissal for procedural reasons that prevents a refiling and hearing on the merits. There is no question that plaintiff's voluntary dismissal was an act of

procedure that was intended ultimately to secure a hearing on the merits, if necessary.

Accordingly,[1] since the only purpose of the Court in denying a continuance of the trial and bringing pressure on plaintiff's counsel to dismiss was to deny plaintiff priority on the Court's calendar, plaintiff has demonstrated a reason under Civil Rule 60(B)(5) to vacate the dismissal. The motion to vacate is granted on condition that plaintiff pay to defendants all expenses of this litigation reasonably incurred by them since August 10, 1992 that relate to the refiling of plaintiff's claim or the vacating of this dismissal order.

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[1] The Court is satisfied that plaintiff's claim has sufficient merit to proceed to trial since defendant never filed a successful motion for summary judgment.

Pretrial conference is set for 10/3/94 at 2:30 p.m. Trial is set for 11/14/94 at 9 a.m. All discovery shall be completed prior to the pretrial conference.

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

DATE: July 1, 1994

CERTIFICATE OF SERVICE

A copy of the foregoing **Ruling and Opinion** has been forwarded by regular U. S. Mail this 1st day of July, 1994, to:

Peter Weinberger, Esq.
2400 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3400
Attorney for Plaintiff

Thomas Escovar, Esq.
55 Public Square
Ste. 1828
Cleveland, Ohio 44113
Attorney for Plaintiff

Forrest Norman, Esq.
Bulkley Building, 7th Floor
1501 Euclid Avenue
Cleveland, Ohio 44115
Attorney for Defendant

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
CASE NOS. 67010 AND 67649

ROOSEVELT CERNEY	:	
	:	
Plaintiff-Appellant/	:	
Cross-Appellee	:	
	:	JOURNAL ENTRY
-vs-	:	AND
	:	OPINION
NORFOLK & WESTERN	:	
RAILWAY	:	
CO., ET AL.	:	
	:	
Defendants-Appellees	:	
Cross-Appellants	:	

DATE OF ANNOUNCEMENT
OF DECISION: MAY 25, 1995

CHARACTER OF PROCEEDING:
CIVIL APPEAL FROM THE
COMMON PLEAS COURT
CASE NOS.CV-256351 AND
CV-194859

JUDGMENT: AFFIRMED.

DATE OF
JOURNALIZATION: JUNE 05 1995

APPEARANCES:

For Plaintiff-Appellant/
Cross-Appellee, Roosevelt
Cerney:

PETER H. WEINBERGER (#0022076)
SPANGENBERG, SHIBLY, TRACI
& LANCIONE & LIBER
2400 NATIONAL CITY CENTER
1900 EAST NINTH STREET
CLEVELAND, OH 44114-3400

THOMAS J. ESCOVAR (#0011532)
STEUER, ESCOVAR & BERK CO., LPA
1828 ILLUMINATING BUILDING
55 PUBLIC SQUARE
CLEVELAND, OH 44113

For Defendant-Appellees/
Cross-appellants, Norfolk &
Western Railway Company and
Norfolk & Southern Corp.:

FORREST A. NORMAN (#0009965)
JAY CLINTON RICE (#0000349)
GALLAGHER, SHARP, FULTON
& NORMAN
SEVENTH FLOOR - BULKLEY BUILDING
1501 EUCLID AVENUE
CLEVELAND, OH 44115

SPELLACY, P.J.:

In appellate Case Number 67010, Roosevelt Cerney ("Cerney") appeals the dismissal with prejudice of his complaint brought under the Federal Employers' Liability Act (FELA). Cerney sought recovery for injuries received due to the alleged negligence of his employer, Norfolk & Western Railway Company and Norfolk Southern Corporation ("Norfolk").

In Appellate Case No. 67649, Norfolk appeals the grant of Cerney's Civ.R. 60(B) motion vacating the dismissal of Cerney's complaint with prejudice. The case then was reinstated.

The two cases have been consolidated upon appeal.

Cerney assigns the following assignments of error for review:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT/APPELLEES' MOTION FOR DISMISSAL IN C.P. CASE NO. 256351, AS DEFENDANT/APPELLEE WAS BARRED FROM CLAIMING DEFENSE OF LIMITATION OF ACTIONS BY THE DOCTRINES OF ESTOPPEL AND/OR WAIVER.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE THREE-YEAR LIMITATION OF ACTIONS SET FORTH IN THE F.E.L.A. STATUTE WAS NOT TOLLED BY THE FILING OF THE ORIGINAL ACTION.

Finding Cerney's appeal to lack merit, the judgment of the trial court is affirmed.

I.

On August 9, 1988, Cerney was injured when he was thrown from a track sweeper which derailed. Cerney filed suit on August 8, 1990, pursuant to FELA, 45 U.S. section 51, *et seq*. alleging his injuries were caused by Norfolk's negligence. FELA's statute of limitation provides that a suit must be commenced within three years from the day the cause of action accrued.

After numerous delays, the case was set for trial on August 11, 1992. Cerney's new counsel filed a motion for continuance. On August 4, 1992, a pre-trial conference was held. The trial court refused to grant the motion for continuance because the case had been pending for two years and it was required by the rules of the Supreme Court to resolve personal injury cases within two years. The trial court then informed Cerney's counsel of the option of voluntarily dismissing the case without prejudice and refiling, if necessary, within one year. Cerney filed a notice of voluntary dismissal on August 10, 1992.

After a settlement agreement could not be reached, Cerney refiled his complaint on August 6, 1993. Norfolk filed a motion to dismiss, asserting the complaint was filed outside the three year statute of limitations provided for under FELA. Norfolk argued Ohio's savings statute, R.C. 2305.19, did not apply pursuant to *Burnett v. New York Central Railway Company* (1965), 380 U.S. 424. In *Burnett*, the United States Supreme Court stated the Ohio Savings Statute could not be used to extend FELA's statute of limitations. On December 22, 1993, Cerney filed a motion for declaratory judgment seeking to have the voluntary dismissal declared *void ab initio*. Cerney argued that the

judgment was void because the voluntary dismissal was filed with the understanding that the matter could be refiled pursuant to the savings statute. Under *Burnett* such a refiling was not permitted and, therefore, the understanding upon which the dismissal was predicated was not possible.

On February 15, 1994, the trial court denied Cerney's motion for declaratory judgment and granted Norfolk's motion to dismiss with prejudice. Cerney appealed from this ruling.

On February 25, 1994, Cerney filed a motion for relief from judgment pursuant to Civ.R. 60(A) and (B). The trial court ruled Civ.R. 60(A) to be inapplicable as the dismissal was a result of an error of judgment by Cerney's counsel and not a clerical mistake in the judgment. The trial court granted the motion based on Civ.R. 60(B)(5). Norfolk appealed from the judgment entry.

II.

In his first assignment of error, Cerney contends the trial court erred in dismissing the case with prejudice as Norfolk was barred from asserting the defense of the statute of limitations. Cerney maintains Norfolk was equitably estopped from claiming the defense or had waived the issue. Cerney argues Norfolk acquiesced to the voluntary dismissal as it raised no objections at the final pre-trial. Norfolk also consented to the journal entry dismissing the case.

The doctrine of equitable estoppel has been employed to bar reliance on the defense of statute of limitations. *Glus v. Brooklyn Eastern District Terminal* (1959), 359 U.S. 231, 233. In *Atkins v. Union Pacific Railroad Company* (1985, 9th Cir.), 753 F.2d 776, the court held:

> [E]quitable estoppel will not apply to a claim such as this one unless the plaintiff shows either (1) an affirmative statement that the statutory period to bring an action was larger than it actually was, (2) promises to make a better settlement of the claim if plaintiff did not bring the threatened suit, or (3) similar representations or conduct on the part of the defendants.

Id. at 777.

The parties stipulated that Norfolk's attorney neither acquiesced in nor objected to the suggestion Cerney could dismiss his case and refile within one year. There is nothing in the record indicating Norfolk was aware of the *Burnett* case prior to the dismissal. Cerney can point to no affirmative statement, representations, conduct, or promises on the part of Norfolk which induced him to voluntarily dismiss his case. Further, Norfolk could not consent to the judgment entry as the dismissal was effective at the point Cerney filed his notice of dismissal not when the judgment was entered. Civ.R. 41(A)(1).

Cerney also argues Norfolk waived the defense of the statute of limitations. Cerney never made this argument to the trial court. This court only can review issues presented below. Because the issue was raised for the first time on appeal, this court declines to address it. *Garg v. Venkataraman* (1985), 54 Ohio App.3d 171, 173.

Cerney's first assignment of error lacks merit.

III.

In his second assignment of error, Cerney asserts the trial court erred in holding the statute of limitations was not tolled by the filing of his original action. Cerney argues

Burnett does not apply as the statements regarding the saving statutes are dicta and not the holding of the case.

The *Burnett* court pointed out that saving statutes allow a plaintiff a specified period of time in which to bring a second action after the first timely action is dismissed for procedural reasons. If Burnett's action had arisen under Ohio law, the savings statute would have been applicable. The court went to state:

> This does not mean that we can accept petitioner's argument that the federal limitation provision incorporates the Ohio Saving Statute. To allow the limitation provision to incorporate state saving statutes would produce nonuniform periods of limitation in the several States. The scope of such statutes and the length of additional time they allow vary considerably from State to State. (Footnote omitted.) Moreover, not all States have saving statutes. (Footnote omitted.) This Court has long recognized that the FELA "has a uniform operation, and neither is nor can be deflected therefrom by local statutes." *Panama R. Co. v. Johnson*, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748; Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. Co.], 223 U.S. 1, 51, 55, 32 S.Ct. 169, 175, 177, 56 L.Ed. 327. This Court has also specifically held that "[t]he period of time within which an action may be commenced is a material element in [a] uniformity of operation" which Congress would not wish "to be destroyed by the varying provisions of the State statutes of limitation." *Engel v. Davenport*, 271 U.S. 33, 39, 46 S.Ct. 410, 413, 70 L.Ed. 813. The incorporation of variant state saving

> statutes would defeat the aim of a federal limitation provision designed to produce national uniformity.

Id., at 432-433. The specific language of the *Burnett* opinion does not allow the use of saving statutes to extend the time in which an action may be brought. The court quotes the holding of *Engel* to underscore the need for uniformity in the period of time in which suit can be brought. The *Burnett* court affirmatively rejected the use of saving statutes in FELA actions.

The trial court did not err by failing to toll the time by use of the saving statute in the instant case.

Cerney's second assignment of error is overruled.

The judgment in Appellate Case Number 67010 is affirmed.

IV.

Norfolk appeals from the grant of Cerney's Civ.R. 60(B) motion for relief from judgment in Appellate Case Number 67649. Norfolk raises the following assignments of error upon appeal:

> I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT, VACATING ITS ORDER OF DISMISSAL, AND REINSTATING THIS FELA ACTION WHICH PLAINTIFF HAD VOLUNTARILY DISMISSED ON AUGUST 10, 1992, ON THE GROUNDS THAT REINSTATEMENT TWO YEARS AFTER JUDGMENT AND SIX YEARS AFTER PLAINTIFF'S ACCIDENT VIOLATES CONTROLLING FEDERAL LAW 45 U.S.C. § 56

AND IS PROHIBITED BY THE UNITED STATES SUPREME COURT DECISION OF *BURNETT V. NEW YORK CENTRAL RAILROAD CO.*, 380 U.S. 424 (1965).

II. THE TRIAL COURT ERRED IN APPLYING OHIO CIVIL RULE 60(B)(5) AS THE BASIS FOR GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM HIS VOLUNTARY DISMISSAL OF HIS OWN FELA ACTION WHICH WAS DONE IN THE MISTAKEN BELIEF THAT THE OHIO SAVINGS STATUTE WOULD PERMIT REFILING, ON THE GROUNDS THAT (1) RULE 60(B)(5) CANNOT BE USED AS A MEANS OF CIRCUMVENTING THE ONE-YEAR TIME LIMIT FOR FILING A MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(B)(1); AND (2) RULE 60(B)(5) IS ONLY TO BE USED IN AN EXTRAORDINARY AND UNUSUAL CASE AND CERTAINLY CANNOT BE USED WHERE REINSTATEMENT OF PLAINTIFF'S ACTION IS PROHIBITED BY FEDERAL LAW AND UNITED STATES SUPREME COURT PRECEDENT. *CARUSO-CIRESI, INC. v. LOHMAN*, 5 OHIO ST.3D 64 (1983).

III. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT, ON THE GROUNDS THAT IN ORDER TO PREVAIL ON A MOTION BROUGHT UNDER OHIO CIVIL RULE 60(B), THE MOVANT MUST DEMONSTRATE THAT HE HAS A MERITORIOUS CLAIM TO PRESENT IF RELIEF IS GRANTED AND IN THIS CASE THE PLAINTIFF PRESENTED ABSOLUTELY NO EVIDENCE IN SUPPORT OF HIS CLAIM AGAINST THE RAILROAD. *GTE AUTOMATIC*

ELECTRIC, INC. V. ARC INDUSTRIES, INC., 47 OHIO ST.2D 146 (1976).

IV. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT IN CASE NO. 194859 AND REINSTATING HIS COMPLAINT AFTER THE COURT HAD ALREADY GRANTED DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S REFILED FELA ACTION IN CASE NO. 256351 IN WHICH PLAINTIFF PRESENTED THE SAME ARGUMENTS AND EVIDENTIARY MATERIALS, ON THE GROUNDS THAT THE DOCTRINE OF *RES JUDICATA* PROHIBITS REPEATED CHALLENGES TO A JUDGMENT ENTRY. *BRICK PROCESSORS, INC. V. CULBERTSON*, 2 OHIC APP.3D 478 (CUYAHOGA CTY. 1981); *DAWSON V. UDELSEN*, 37 OHIO APP.3D 141 (CUYAHOGA CTY. 1987).

As none of the assignments of error is meritorious, the judgment is affirmed.

V.

In its first assignment of error, Norfolk argues the trial court erred in granting Cerney's motion for relief from judgment. Norfolk maintains the reinstatement of the case two years after judgment and six years after the accident violated controlling federal law.

Civ.R. 60(B) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable

> neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

Generally, to prevail on a motion brought under Civ.R. 60(B), it must be demonstrated that:

> (1) the party has a meritorious defense or claim to present if relief is granted,
>
> (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5),
>
> (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken.

GTE Automatic Electric v. ARC Industries Inc. (1976), 47 Ohio St.2d 146. If any of these three requirements is not met, the motion should be overruled. *Svoboda v Brunswick* (1983), 6 Ohio St.3d 348, 351. The question of whether

relief should be granted is addressed to the sound discretion of the trial court. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Hopkins v. Quality Chevrolet, Inc.* (1992), 79 Ohio App.3d 578, 581.

Civ.R. 60(B)(5) is a catch-all provision that is not to be used as a substitute for Civ.R. 60(B)(1), (2) or (3), when it is too late to seek relief under those provisions. It is to be used only in extraordinary and unusual cases when the interests of justice warrants it. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. Civ.R. 60(B)(5) reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. *Caruso-Ceresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. The court in *State, ex rel. Gyurcsik, v. Angelotta* (1977), 50 Ohio St.2d 345, quoted Justice Black in *Klapprott v. United States* (1949), 335 U.S. 601, recognizing that the "other reason" clause made available all equitable grounds for relief from a final judgment, said at pages 614-615:

> In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Id. at 346.

The court in *Steadley v. Montanya* (1981), 67 Ohio St.2d 297, upheld the vacation of a judgment even though it extended the time period for filing an appeal. The trial judge had orally promised the defendant an oral hearing prior to ruling on the motion for a new trial. The judgment was

vacated in order to rectify the breach of the oral promise and was not a subterfuge to allow the defendant a way to circumvent the jurisdictional time for filing a notice of appeal. In *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (1993), 67 Ohio St.3d 134, the court stated that a mistake as to a material fact by both parties requires that the parties be relieved of the judgment.

In the instant case, no one anticipated prior to the pretrial hearing that Cerney might file a notice of voluntary dismissal. Neither the trial court nor either party was aware of the effect such a dismissal would have on the case. The result of the dismissal was the end of the suit under *Burnett*. There was no intention on the part of Cerney to circumvent the statute of limitations. Although Cerney's attorney bears the ultimate responsibility for the decision to dismiss the case, it cannot be ignored that the initial suggestion to do so was made by the trial court for reasons that had to do with the court's docket rather than any issue in the case or because of the actions of the parties or attorneys. The trial court, which was involved in all the proceedings, granted the motion for relief in the interests of justice. It did not abuse its discretion in doing so.

Norfolk's first assignment of error lacks merit.

VI.

In its second assignment of error, Norfolk argues the trial court erred in granting Cerney's motion for relief from judgment under Civ.R. 60(B)(5) as this provision cannot be used as a substitute for Civ.R. 60(B)(1). Norfolk maintains the error by Cerney's attorney in dismissing the action constitutes neglect which should be imputed to Cerney for purposes of Civ.R. 60(B)(1). Cerney cannot circumvent the

requirement that his Civ.R. 60(B)(1) motion be filed within one year by characterizing the motion as one falling within the provisions of Civ.R. 60(B)(5).

Civ.R. 60(B) attempts to strike a balance between the competing principles that litigation must be brought to an end and that justice should be done. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248. The rule is a remedial measure and should be liberally construed so as to advance those objectives. *Id.* Generally, the neglect of a party's attorney will be imputed to the party for the purposes of Civ.R. 60(B)(l). *Argo Plastic Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389, syllabus. If the motion should be brought under one of the more specific provisions of Civ.R. 60(B), the catch-all provision of Civ.R. 60(B)(5) can not be used as a substitute. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. However, that requirement does not preclude the use of Civ.R. 60(B)(5) on the basis of operative facts different from and/or in addition to those contemplated by Civ.R. 60(B)(1). *Whitt v. Bennett* (1992), 82 Ohio App.3d 792, 797. Matters of an extraordinary nature fall within the purview of Civ.R. 60(B)(5). *Id.*

In its ruling on Cerney's Civ.R. 60(B) motion, the trial court stated that a central reason for the voluntary dismissal was a mistake in judgment by Cerney's counsel and inadequate preparation by his original counsel. However, the parties, counsel and the trial court believed that Cerney's voluntary dismissal would allow the case to be refiled within one year. The trial court went on to state:

> Although inadequate preparation by original counsel was the underlying cause of the need to dismiss, the

remaining decisions reflected a desire by plaintiff's counsel to be diligent. None of plaintiff's loss of his right to a trial stems from a judgment about the merits of his case. Rather, issues of court management and lawyer performance have caused him to suffer.

It is not the purpose of the Rules of Superintendence to deny a party a hearing on the merits of his case. Only the most extreme or repeated lawyer misconduct should ordinarily justify a dismissal for procedural reasons that prevent a refiling and hearing on the merits. There is no question that plaintiff's voluntary dismissal was an act of procedure that was intended ultimately to secure a hearing on the merits, if necessary.

Accordingly, since the only purpose of the Court in denying a continuance of the trial and bringing pressure on plaintiff's counsel to dismiss was to deny plaintiff priority on the Court's calendar, plaintiff has demonstrated a reason under Civil Rule 60(B)(5) to vacate the dismissal.

This is a case in which the operative facts leading to the dismissal are in addition to those contemplated by Civ.R. 60(B)(1). The "neglect" here was due in part to counsel following the suggestion of the court. The situation arose after the court pressured counsel into taking an unanticipated course of action. None of the parties involved expected a dismissal would bring an end to the case. There was little time in which to discover the result of a dismissal in the time left before trial.

The trial court not only was familiar with the procedural history of the instant case, it was involved as well. The

neglect which took place was not that which was contemplated by Civ.R. 60(B)(1). Rather, the situation which led to the dismissal falls within the ambit of Civ.R. 60(B)(5). The trial court did not abuse its discretion in rectifying the dismissal in the interests of justice.

Norfolk's second assignment of error is overruled.

VII.

In its third assignment of error, Norfolk asserts the trial court should not have granted Cerney's Civ.R. 60(B) motion as he failed to demonstrate he had a meritorious claim. Cerney did not provide evidence to support his claim.

In his motion for relief from judgment, Cerney averred he was injured as a result of Norfolk's negligence. Cerney then stated he had set forth a meritorious claim in his original complaint. He pointed out that Norfolk had never claimed he had failed to state a meritorious claim for relief.

Generally, this court requires a Civ.R. 60(B) movant to set forth operative facts by way of affidavit or other evidentiary material demonstrating that the movant has a meritorious defense or claim to present. *Bancroft v. Communicators, Inc.* (1986), 34 Ohio App.3d 165, 168. This is not required by the Supreme Court of Ohio. For purposes of a Civ.R. 60(B), the movant's burden is to allege a meritorious claim. *Volodkevich v. Volodkevich* (1988), 35 Ohio St.3d 152. Cerney has alleged a meritorious claim by stating he was injured because of Norfolk's negligence. Under the facts and procedural occurrences of this case and primarily to further the interests of justice, Cerney's allegation will be regarded as sufficient.

Norfolk's third assignment of error is overruled.

VIII.

In its fourth assignment of error, Norfolk contends the trial court erred in granting Cerney's Civ.R. 60(B)(5) motion as the doctrine of *res judicata* prohibits repeated challenges to a judgment entry. Norfolk argues the voluntary dismissal was a final order under federal law and that the dismissal with prejudice of the second complaint precluded Cerney from again challenging the judgment entry.

The doctrine of *res judicata* prevents the successive filings of motions from relief from judgment. *McCann v. Lakewood* (1994), 95 Ohio App.3d 226. *Res judicata* does not apply to a subsequent Civ.R. 60 (B) motion when the subsequent motion is based on different facts, asserts different grounds for relief, or it is not certain the issue could have been raised in the prior motion. *Dawson v. Udelsen* (1987), 37 Ohio App.3d 141.

Cerney only filed one Civ.R. 60(B) motion. The issues raised in his response to Norfolk' s motion to dismiss were not completely the same. A response to a motion by the opposing party hardly is similar to a party filing a motion. The cases cited by Norfolk all involve subsequent Civ.R. 60(B) motions. That is not what occurred in the instant case. *Res judicata* did not bar Cerney from filing a motion for relief from judgment.

Norfolk s fourth assignment of error is overruled.

Judgment in appellate case number 67649 is affirmed.

It is ordered that appellee/cross-appellant and appellant/ cross-appellee each pay one half of the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules Appellate Procedure.

PATRICIA BLACKMON, J. and
DONALD C. NUGENT, J., CONCUR

/s/ Leo M. Spellacy
LEO M. SPELLACY
PRESIDING JUDGE

Received for Filing:
May 25, 1995
Gerald E. Fuerst,
Clerk By /s/ JW
Dep.

JOURNALIZED June 05, 1995
Gerald E. Fuerst, Clerk
of Courts By /s/ Amy
Deputy

COPIES MAILED TO COUNSEL FOR
ALL PARTIES -- COSTS TAXED.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

The Supreme Court of Ohio

1995 TERM

To wit: October 4, 1995

Roosevelt Cerney,	:	
Appellee,	:	Case No. 95-1260
v.	:	ENTRY
Norfolk & Western	:	
Railway Co. et al.,	:	
Appellants.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Gallagher, Sharp, Fulton & Norman.

(Cuyahoga County Court of Appeals; Nos. 67010 & 67649)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

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*** THIS DOCUMENT IS CURRENT
THROUGH JANUARY 1, 1995 ***

ALABAMA RULES OF CIVIL PROCEDURE WITH DISTRICT COURT MODIFICATIONS

VII. JUDGMENT

ARCP, Rule 60 (1995)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal or thereafter, such mistakes may be so corrected by the trial court. Whenever necessary a transcript of the record as corrected may be certified to the appellate court in response to a writ of certiorari or like writ.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud

(whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than four months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. If leave of the appellate court is obtained, the motion shall be deemed to have been made in the trial court as of the date upon which leave to make the motion was sought in the appellate court. This rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three years after the entry of the judgment (or such additional time as is given by Tit. 7, §§ 36 and 42 Code of Ala.) to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, supersedeas, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(dc) District court rule. Rule 60 applies in the district courts.

ALASKA COURT RULES

*** THE 1994-95 EDITION OF THE
ALASKA RULES OF COURT ***

RULES OF CIVIL PROCEDURE
PART IX. JUDGMENT

Alaska R. Civ. Proc. 60

Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal or petition for review to the Supreme Court, such mistakes may be so corrected before the record is filed in the Supreme Court, and thereafter may be so corrected with leave of the Supreme Court.

(b) Mistakes -- Inadvertence -- Excusable Neglect -- Newly Discovered Evidence -- Fraud -- Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or orders as defined in Civil Rule 58.1 (c). A motion under this subdivision (b) does not affect the finality of a judgment suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis and audita querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ARIZONA RULES OF COURT

*** THIS DOCUMENT IS CURRENT THROUGH OCTOBER 1, 1994 ***

RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURTS OF ARIZONA
VII. JUDGMENT
RULE 60. RELIEF FROM JUDGMENT OR ORDER

ARIZ. ST RCP R. 60 (1994)

RULE 60 (a) CLERICAL MISTAKES.

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party and after such notice, if any, as the court orders. During pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

RULE 60 (b) CORRECTION OF ERROR IN RECORD OF JUDGMENT.

1. When a mistake in a judgment is corrected as provided by subdivision (a) of this Rule, thereafter the execution shall conform to the judgment as corrected.

2. Where there is a mistake, miscalculation or misrecital of a sum of money, or of a name, and there is among the record of the action a verdict or instrument of writing whereby such judgment may be safely corrected, the

court shall on application and after notice, correct the judgment accordingly.

RULE 60 (c) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed these rules or by an independent action.

ARKANSAS CODE OF 1987 ANNOTATED
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***(THIS DOCUMENT IS CURRENT
THROUGH FEBRUARY 1, 1994)***

RULES OF CIVIL PROCEDURE

ARCP Rule 60 (1994)

Rule 60. RELIEF FROM JUDGMENT, DECREE OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Ninety-Day Limitation. To correct any error or mistake or to prevent the miscarriage of justice, a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.

(c) Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days. The court in which a

judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:

(1) By granting a new trial where the grounds therefor were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(c), upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds or one year after the judgment was filed with the clerk of the court, whichever is the earlier; provided, notice of said motion has been served within the time limitations for filing the motion.

(2) By a new trial granted in proceedings against defendants constructively summoned, and who did not appear, upon a motion filed within two years after the filing of the judgment with the clerk of the court, or within one year after a certified copy of the judgment has been served upon the defendant, whichever shall be the earlier, upon security for costs being given; provided notice of the filing of said motion has been serve upon the adverse party within the time limitations for filing the motion.

(3) For misprisions of the clerk.

(4) For fraud practiced by the successful party in obtaining the judgment. (5) For erroneous proceedings against an infant or person of unsound mind where the

condition of such defendant does not appear in the record, nor the error in the proceedings.

(6) For the death of one of the parties before the judgment in the action.

(7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years, upon a showing of cause.

(d) Valid Defense to Be Shown. No judgment against a defendant, unless it was rendered before the action stood for trial, shall be set aside under this rule unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense.

(e) Valid Cause of Action to Be Shown. No judgment, unless it was rendered before the action stood for trial, shall be set aside on the motion of a plaintiff unless the plaintiff makes a prima facie showing of a valid cause of action.

(f) Defendant Constructively Summoned -- Restoration of Property. When a judgment is set aside on the motion of a defendant constructively summoned, the court may order the plaintiff in the action to restore to the defendant any money of the defendant paid under the judgment or any property of the defendant obtained by the plaintiff under it and yet remaining in his possession and pay to the defendant the value of any property which may have been taken under an attachment in the action or under the judgment and not restored. The title of purchasers in good faith to any property sold under an attachment or judgment shall not be affected by a new trial under subsection (c)(2)

of this rule, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

(g) Exception for Divorce Decrees. No judgment granting a divorce, except as it relates to alimony, shall be set aside under subsection (c)(2) of this rule.

(h) Premature Judgment. Rendering judgment prior to the time fixed for filing an answer shall be deemed a clerical misprision. No misprision of the clerk shall be ground for appeal until relief has been sought in the trial court and action taken there.

(i) Motion to Vacate or Modify May Be Heard First. The trial court may first try and decide upon the grounds for vacating or modifying a judgment before trying or deciding the validity of the defense or cause of action.

(j) Injunction Pendente Lite. The party seeking to vacate or modify a judgment may obtain an injunction suspending proceedings, on the whole or in part, upon showing by affidavit or exhibition of the record that it is probable that he is entitled to have such judgment, decree or order vacated or modified; however, such a showing shall not be required if the judgment, decree or order was rendered before the action stood for trial.

(k) Independent Action to Set Aside Judgment -- Writs Abolished. A motion under this rule does not affect the finality of a judgment or decree or suspend its operation, except as provided herein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment who was not actually personally served with process or to set aside a judgment or decree for fraud upon the court. Writs of coram nobis in civil cases, coram vobis, audita querela, and bills of review and bills in

the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

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*** THIS SECTION IS CURRENT THROUGH
THE 1995 SUPPLEMENT (1994 SESSION) ***

THE CODE OF CIVIL PROCEDURE
PART 2. Civil Actions
TITLE 8. Trial and Judgment in Civil Actions
CHAPTER 7. Provisions Relating to Trials in General
ARTICLE 2. New Trials

Cal Code Civ Proc @ 657 and 659 (1995)

@ 657. Grounds for new trial; Requisites of order granting new trial for insufficiency of evidence

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the

determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain

such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

@ 659. Notice of motion; Filing and service, time; Contents; Extension of time

The party intending to move for a new trial must file with the clerk and serve upon each adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both, either

1. Before the entry of judgment; or

2. Within 15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest, provided, that upon the filing of the first notice of intention to move for a new trial by a party, each other party shall have 15 days after the service of such notice upon him to file and serve a notice of intention to move for a new trial.

Said notice of intention to move for a new trial shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above specified shall not be extended by order or stipulation or by those provisions of Section 1013 of this code which extend the time for exercising a right or doing an act where service is by mail.

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COLORADO COURT RULES
RULES OF CIVIL PROCEDURE FOR COURTS OF RECORD IN COLORADO
CHAPTER 6. JUDGMENT

C.R.C.P. 60 (1995)

Rule 60. Relief From Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (3) the judgment is void; (4) the

judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action. Writs of coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

GENERAL STATUTES OF CONNECTICUT

*** THIS DOCUMENT IS CURRENT
THROUGH ALL 1994 LEGISLATION ***

TITLE 52. CIVIL ACTIONS
CHAPTER 900. COURT PRACTICE
AND PROCEDURE

Conn. Gen. Stat. @ 52-212, 212a, 228, 228b (1994)

@ 52-212. Reopening judgment upon default or nonsuit

(a) Any judgment rendered or decree passed upon a default or nonsuit in the superior court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense.

(b) The complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or defendant failed to appear.

(c) The court shall order reasonable notice of the pendency of the complaint or written motion to be given to

the adverse party, and may enjoin him against enforcing the judgment or decree until the decision upon the complaint or written motion.

@ 52-212a. Civil judgment or decree reopened or set aside within four months only

Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the superior court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. The continuing jurisdiction conferred on the court in preadoptive proceedings pursuant to subsection (i) of section 17a-112 does not confer continuing jurisdiction on the court for purposes of reopening a judgment terminating parental rights. The parties may waive the provisions of this section or otherwise submit to the jurisdiction of the court, provided the filing of an amended petition for termination of parental rights does not constitute a waiver of the provisions of this section or a submission to the jurisdiction of the court to reopen a judgment terminating parental rights.

@ 52-228. Judgment too large; remittitur; correction

If any judgment is rendered, by mistake or clerical error, for a larger sum than is due, the party recovering the judgment may have the amount of the judgment decreased by remittitur to the amount which is due, provided reasonable notice has been given to the adverse party or his attorney. The court may thereupon order the record of the judgment

to be corrected, and affirm the judgment for the amount to which it has been decreased.

@ 52-228b. Setting aside of verdict in action claiming money damages

No verdict in any civil action involving a claim for money damages may be set aside except on written motion by a party to the action, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of the court. No such verdict may be set aside solely on the ground that the damages are excessive unless the prevailing party has been given an opportunity to have the amount of the judgment decreased by so much thereof as the court deems excessive. No such verdict may be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court deems reasonable.

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RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURT OF THE STATE OF DELAWARE
VII. JUDGMENT

Del. Super. Ct. Civ. R. 60 (1995)

Rule 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders.

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment

upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the Court, or to deal with judgments by confession as provided by law. Writs of coram nobis, coram vobis, and audita querela are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action.

FLORIDA RULES OF COURT SERVICE

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FLORIDA RULES OF CIVIL PROCEDURE

Fla. R. Civ. P. 1.540 (1994)

Rule 1.540. RELIEF FROM JUDGMENT, DECREES OR ORDERS

(a) Clerical Mistakes. Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the record on appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move or a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or

extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken, except that there shall be no time limit for motions based on fraudulent financial affidavits in marital cases. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

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*** THIS SECTION IS CURRENT
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*** (1995 SESSION OF THE
GENERAL ASSEMBLY) ***

TITLE 9. CIVIL PRACTICE
CHAPTER 11. CIVIL PRACTICE ACT
ARTICLE 7. JUDGMENT

O.C.G.A. @ 9-11-60 (1995)

@ 9-11-60. Relief from judgments

(a) Collateral attack. A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods prescribed in this Code section.

(b) Methods of direct attack. A judgment may be attacked by motion for a new trial or motion to set aside. Judgments may be attacked by motion only in the court of rendition.

(c) Motion for new trial. A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings.

(d) Motion to set aside. A motion to set aside may be brought to set aside a judgment based upon:

(1) Lack of jurisdiction over the person or the subject matter;

(2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

(3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

(e) Complaint in equity. The use of a complaint in equity to set aside a judgment is prohibited.

(f) Procedure; time of relief. Reasonable notice shall be afforded the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new trial must be brought within the time prescribed by law. In all other instances, all motions to set aside judgments shall be brought within three years from entry of the judgment complained of.

(g) Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(h) Law of the case rule. The law of the case rule is abolished; but generally judgments and orders shall not be

set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.

HAWAII REVISED STATUTES ANNOTATED
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*** (THIS DOCUMENT CURRENT
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HAWAII RULES OF CIVIL PROCEDURE
VII. JUDGMENT

HRCP, Rule 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the supreme court, and thereafter while the appeal is pending may be so corrected with leave of the supreme court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audit a querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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IDAHO RULES OF CIVIL PROCEDURE

I.R.C.P. 60 (a) (b) (1994)

Rule 60(a). Relief from judgment or order -- Clerical mistakes.

-- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court or the district court, as the case may be, and thereafter while the appeal is pending may be so corrected.

Rule 60 (b). Mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, grounds for relief from judgment on order.

-- On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for

a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (6) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in said action, or to set aside a judgment for fraud upon the court.

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*** THIS SECTION IS CURRENT
THROUGH PUBLIC ACT 89-2 ***
*** (1995 SUPPLEMENT) ***

CHAPTER 735. CIVIL PROCEDURE
CODE OF CIVIL PROCEDURE
ARTICLE II. CIVIL PRACTICE
PART 13. JUDGMENT
PART 14. POST-JUDGMENT
735 ILCS 5/2-1301, 1401 (1995)

OLD-CITE: [Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 110, para. 2-1301]
@ 735 ILCS 5/2-1301. Judgments -- Default -- Confession

Sec. 2-1301. Judgments -- Default -- Confession. (a) The court shall determine the rights of the parties and grant to any party any affirmative relief to which the party may be entitled on the pleadings and proofs. Judgments shall be in the form required by the nature of the case and by the recovery or relief awarded. More than one judgment may be rendered in the same cause. If relief is granted against a party who upon satisfying the same in whole or in part will be entitled by operation of law to be reimbursed by another party to the action, the court may determine the rights of the parties as between themselves, and may thereafter upon motion and notice in the cause, and upon a showing that satisfaction has been made, render a final judgment against the other party accordingly.

(b) A determination in favor of the plaintiff on an issue as to the truth or validity of any defense in abatement shall be that the defendant answer or otherwise plead.

(c) Except as otherwise limited by this subsection (c), any person for a debt bona fide due may confess judgment by himself or herself or attorney duly authorized, without process. The application to confess judgment shall be made in the county in which the note or obligation was executed or in the county in which one or more of the defendants reside or in any county in which is located any property, real or personal, owned by any one or more of the defendants. A judgment entered by any court in any county other than those herein specified has no force or validity, anything in the power to confess to the contrary notwithstanding.

No power to confess judgment shall be required or given after September 24, 1979 in any instrument used in a consumer transaction; any power to confess given in violation hereof is null and void and any judgment entered by a court based on such power shall be unenforceable. "Consumer transaction" as used in this Section means a sale, lease, assignment, loan, or other disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household.

(d) Judgment by default may be entered for want of an appearance, or for failure to plead, but the court may in either case, require proof of the allegations of the pleadings upon which relief is sought.

(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or

judgment upon any terms and conditions that shall be reasonable.

(f) The fact that any order or judgment is joint does not deprive the court of power to set it aside as to fewer than all the parties, and if so set aside it remains in full force and effect as to the other parties.

(g) If any final judgment is entered against any defendant who has been served by publication with notice of the commencement of the action and who has not been served with a copy of the complaint, or received the notice required to be sent him or her by mail, or otherwise brought into court, and such defendant or his or her heirs, legatees, or personal representatives, as the case may require, shall, within 90 days after notice in writing given him or her of the judgment, or within 1 year after the judgment, if no notice has been given, appear in open court and petition to be heard touching the matter of the judgment, the court shall upon notice being given to the parties to such action who appeared therein and the purchaser at a sale made pursuant to the judgment, or their attorneys, set the petition for hearing and may allow the parties and the purchaser to answer the petition. If upon the hearing it appears that the judgment ought not to have been made against the defendant, it may be set aside, altered or amended as appears just; otherwise the petition shall be dismissed at petitioner's costs. If, however, a sale has been had under and pursuant to the final judgment, the court, in altering or amending the judgment may, upon terms just and equitable to the defendant, permit the sale to stand. If upon the hearing of the petition it appears that the defendant was entitled under the law to redeem from the sale, the court shall permit redemption to

be made at any time within 90 days thereafter, upon terms that are equitable and just.

OLD-CITE: [Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 110, para. 2-1401]

@ 735 ILCS 5/2-1401. Relief from judgments

Sec. 2-1401. Relief from judgments. (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) Except as provided in Section 20b of the Adoption Act [750 ILCS 50/20b], the petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently

concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

BURNS INDIANA STATUTES
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***(THIS DOCUMENT IS CURRENT
THROUGH FEBRUARY 1, 1994)***

RULES OF TRIAL PROCEDURE
VII. JUDGMENT

Burns Ind. TR. 60 (1994)

Trial Rule 60 RELIEF FROM JUDGMENT OR ORDER

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time before the record is filed on appeal of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the court on appeal, and thereafter while the appeal is pending may be so corrected with leave of the court on appeal. :x60

(B) Mistake -- Excusable neglect -- Newly discovered evidence -- Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(1) Mistake, surprise, or excusable neglect;

(2) Any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) Entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowlege [knowledge] of the action and judgment, order or proceedings;

(5) Except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that

(a) At the time of the action he was an infant or incompetent person, and

(b) He was not in fact represented by a guardian or other representative, and

(c) The person against whom the judgment, order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) No appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) The motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) The motion alleges a valid defense or claim;

(6) The judgment is void;

(7) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(8) Any reason justifying relief from the operation of the judgment, other than those reasons set forth in subparagraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from judgment shall be by motion as prescribed in these rules or by an independent action. :x60

(C) Appeal -- Change of venue. A ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in

the case of a judgment. No change of venue in such cases shall be taken from the judge or county except for cause shown by affidavit. :x60

(D) Hearing and relief granted. In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule. :x60

(E) Infants, incompetents, and governmental organizations. Except as otherwise provided herein, this rule shall apply to infants, incompetents, and governmental organizations. The time for seeking relief against a judgment, order or proceedings allowed or recognized under subdivision (B) of this rule or any other statute shall not be tolled or extended as to such persons.

CODE OF IOWA 1995

*** THIS DOCUMENT IS CURRENT THROUGH THE 1995 EDITION (1994 LEGISLATION) ***

TITLE XV JUDICIAL BRANCH AND JUDICIAL PROCEDURES
SUBTITLE 3 CIVIL PROCEDURE
CHAPTER 624A PROCEDURE TO VACATE OR MODIFY JUDGMENTS

Iowa Code @ 624A.1-A.3 (1995)

624A.1 Time limit

Such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto is a minor or person of unsound mind, and then within one year after the removal of such disability.

624A.2 Cause of action or defense -- necessity

The judgment shall not be vacated on motion or petition until it is adjudged there is a cause of action or defense to the action in which the judgment is rendered.

624A.3 Injunction

The party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings on the whole or part thereof, which shall be granted by the court upon its being rendered probable, by affidavit or verified petition, or by exhibition of the record, that the party is entitled to the relief asked.

KANSAS STATUTE ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH THE 1994 SUPPLEMENT (1994 SESSION) ***

CHAPTER 60. PROCEDURE, CIVIL
ARTICLE 2. RULES OF CIVIL PROCEDURE

K.S.A. § 60-260 (1994)

60-260. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the record on appeal is filed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or said party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under K.S.A. 60-259 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or

discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (b) does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in K.S.A. 60-309 or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in this article or by an independent action.

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*** THIS DOCUMENT IS CURRENT
THROUGH NOVEMBER 1, 1994 ***

RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT
60. RELIEF FROM JUDGMENT OR ORDER

Ky CR 60.01 and 60.02 (1994)

60.01 Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

60.02 Relief by motion on grounds of mistakes, newly discovered evidence, fraud, etc.

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under

Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

LOUISIANA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1995 SUPP. (ALL 1994 SESSIONS) ***

LOUISIANA CODE OF CIVIL PROCEDURE
BOOK II. ORDINARY PROCEEDINGS
TITLE VI. JUDGMENTS
CHAPTER 4. MODIFICATION IN TRIAL COURT
SECTION 1. AMENDMENT
SECTION 3. ACTION OF NULLITY

La. C.C.P. art. 1951, 2001-2006 (1995)

Art. 1951. Amendment of judgment

A final judgment may be amended by the trial court at any time, with or without notice, on its own motion or on motion of any party:

(1) To alter the phraseology of the judgment, but not the substance; or

(2) To correct errors of calculation.

Art. 2001. Grounds in general

The nullity of a final judgment may be demanded for vices of either form or substance, as provided in Articles 2002 through 2006.

Art. 2002. Annulment for vices of form; time for action

A final judgment shall be annulled if it is rendered:

(1) Against an incompetent person not represented as required by law;

(2) Against a defendant who has not been served with process as required by law and who has not entered a general appearance, or against whom a valid judgment by default has not been taken; or

(3) By a court which does not have jurisdiction over the subject matter of the suit.

Except as otherwise provided in Article 2003, an action to annul a judgment on these grounds may be brought at any time.

Art. 2003. Same; action lost through acquiescence

A defendant who voluntarily acquiesced in the judgment, or who was present in the parish at the time of its execution and did not attempt to enjoin its enforcement, may not annul the judgment on any of the grounds enumerated in Article 2002.

Art. 2004. Annulment for vices of substance; peremption of action

A final judgment obtained by fraud or ill practices may be annulled.

An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices.

Art. 2005. Annulment of judgments; effect of appeal

A judgment may be annulled prior to or pending an appeal therefrom, or after the delays for appealing have elapsed.

A judgment affirmed, reversed, amended, or otherwise rendered by an appellate court may be annulled

only when the ground for nullity did not appear in the record of appeal or was not considered by the appellate court.

An action of nullity does not affect the right to appeal.

Art. 2006. Court where action brought

An action to annul a judgment must be brought in the trial court, even though the judgment sought to be annulled may have been affirmed on appeal, or even rendered by the appellate court.

MAINE RULES OF COURT

*** THIS DOCUMENT IS CURRENT THROUGH MAY 15, 1995 ***

MAINE RULES OF CIVIL PROCEDURE
VII. JUDGMENT

ME R RCP Rule 60 (1995)

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Superior Court or Law Court, and thereafter while the appeal is pending may be so corrected with leave of the Superior Court or Law Court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void; (5) the judgment has been satisfied released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review are abolished as means of reopening judgments entered under these rules, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

MARYLAND RULES OF COURT ANNOTATED
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*** (THIS DOCUMENT IS CURRENT THROUGH JANUARY 10, 1995) ***

TITLE 2. CIVIL PROCEDURE -- CIRCUIT COURT
CHAPTER 500. TRIAL

Md. Rule 2-535 (1995)

Rule 2-535. REVISORY POWER

(a) Generally. -- On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534.

(b) Fraud, Mistake, Irregularity. -- On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Committee note: This section is intended to be as comprehensive as Code, Courts Article § 6-408.

(c) Newly-Discovered Evidence. -- On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.

(d) Clerical Mistakes. -- Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

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RULES OF CIVIL OF PROCEDURE
VII. JUDGMENT

ALM Rules Civ. P. 60

Rule 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has

been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, or error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

MICHIGAN STATUTES ANNOTATED
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MICHIGAN COURT RULES OF 1985
CHAPTER 2. CIVIL PROCEDURE
SUBCHAPTER 2.600. JUDGMENTS AND ORDERS;
POSTJUDGMENT PROCEEDINGS

MSA Rule 2.612; MCR 2.612

Rule 2.612. Relief From Judgment or Order.

(A) Clerical Mistakes.

(1) Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

(2) If a claim of appeal is filed or an appellate court grants leave to appeal, the trial court may correct errors as provided in MCR 7.208(A) and (B).

(B) Defendant Not Personally Notified. A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal

jurisdiction was necessary, on payment of costs or on conditions the court deems just.

(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

(3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

MINNESOTA STATUTES -- COURT RULES

*** CURRENT THROUGH THE
1994 SUPPLEMENT ***
*** (1994 REGULAR AND FIRST
SPECIAL SESSIONS) ***

RULES OF CIVIL PROCEDURE FOR
THE DISTRICT COURTS
VI. TRIAL
Rule 60. RELIEF FROM JUDGMENT OR ORDER

Minn. Dist. Ct. Gen. Rule 60.01 and 60.02 (1994)

60.01 Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time upon its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

60.02 Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud: etc.

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;

(c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(f) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A Rule 60.02 motion does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule 4.043, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

MISSISSIPPI COURT RULES

*** THIS DOCUMENT IS CURRENT THROUGH DECEMBER 31, 1992 ***

MISSISSIPPI RULES OF CIVIL PROCEDURE
CHAPTER VII. JUDGMENT

M.R.C.P. 60

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

REVISED STATUTES OF THE STATE OF MISSOURI

SUPREME COURT RULES

*** (THIS DOCUMENT IS CURRENT THROUGH OCTOBER 31, 1994) ***

RULES OF CIVIL PROCEDURE

PART I RULES GOVERNING CIVIL PROCEDURE IN THE CIRCUIT COURTS AND COURTS OF COMMON PLEAS

RULE 74 JUDGMENTS, ORDERS AND PROCEEDINGS THEREON

S. Ct. Rule 74.06 R.S.Mo. (1994)

74.06 RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes - Procedure. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

(b) Excusable Neglect - Fraud - Irregular, Void, or Satisfied Judgment. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)

fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

(c) Motion Under Subdivision (b) - Affect on Judgment - Time for Filing - Notice of Hearing - Service. A motion under subdivision (b) does not affect the finality of a judgment or suspend its operation. The motion shall be made within a reasonable time and for reasons (1) and (2) and (3) of subdivision (b) not more than one year after the judgment or order was entered. The motion and a notice of a time and place for hearing on the motion shall be served upon the parties to the judgment pursuant to Rule 54.

(d) Power of Court to Entertain Independent Action — Certain Writs Abolished. This Rule 74.05 does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

MONTANA CODE ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH THE 1995 SESSION ***

TITLE 25 CIVIL PROCEDURE
CHAPTER 20 RULES OF CIVIL PROCEDURE
PART VII JUDGMENT

Mont. Code Anno., Ch. 20, Rule 60(a), (b) (c) (1995)

Rule 60(a) Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record, and in pleadings, and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 60(b) Mistakes -- inadvertence -- excusable neglect -- newly discovered evidence -- fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) when a defendant has been personally served, whether in lieu of publication or not, not more than 60 days after the judgment, order or proceeding was entered or taken, or, in a case where notice of entry of judgment is required by Rule 77(d), not more than 60 days after service of notice of entry of judgment. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or a legal representative, at any time within 180 days after the rendition of any judgment in such action, to answer to the merits of the original action. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be required by law, or to set aside a judgment for fraud upon the court.

Rule 60(c) Time for determining motions.

Motions provided by subdivision (b) of this rule shall be determined within the times provided by Rule 59 in the case of motions for new trials and amendment of judgment and if the court shall fail to rule on the motion within the 60 day period, the motion shall be deemed denied.

REVISED STATUTES OF NEBRASKA 1943

*** THIS DOCUMENT IS CURRENT THROUGH THE 1994 SUPPLEMENT (1994 LEGISLATION ***

CHAPTER 25 COURTS; CIVIL PROCEDURE
ARTICLE 20 VACATION OR MODIFICATION JUDGMENTS AT SUBSEQUENT TERM

R.R.S. Neb. § 25-2001 (1994)

25-2001. District court; power to vacate or modify judgments or orders

A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made (1) by granting a new trial of the cause within time and in the manner prescribed in sections 25-1143 and 25-1145; (2) by a new trial granted in proceedings against defendants constructively summoned as provided in section 25-517; (3) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (4) for fraud practiced by the successful party in obtaining the judgment or order; (5) for erroneous proceedings against an infant or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings; (6) for the death of one of the parties before the judgment in the action; (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; (8) for errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section 25-1317; and (9) for taking

judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

NEVADA COURT RULES ANNOTATED
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RULES OF CIVIL PROCEDURE FOR THE NEVADA DISTRICT COURTS
VII. JUDGMENT

Nev. R.C.P. 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is

void; or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(c) Default judgments: Defendant not personally served. When a default judgment shall have been taken against any party who was not personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, and who has not entered his general appearance in the action, the court, after notice to the adverse party, upon motion made within six months from the date of rendition of such judgment may vacate such judgment and allow the party or his legal representatives to answer to the merits of the original action. When, however, a party has been personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, he must make his application to be relieved from default, a judgment, an order, or other proceeding taken against him, or for permission to file his answer, in accordance with the provisions of subdivision (b) of this rule.

(d) Default judgments: Modification nunc pro tunc. Whenever a default judgment or decree has been entered, the party or parties in default therein may at any time thereafter, upon written consent of the party or parties in whose favor judgment or decree has been entered, enter general appearance in the action, and the general appearance so entered shall have the same force and effect as if entered at the proper time prior to the rendition of the judgment or decree. On such appearance being entered the court may make and enter a modified judgment or decree to the extent only of showing such general appearance on the part of the party or parties in default, and it shall be entered nunc pro tunc as of the date of the original judgment or decree; provided, however, that nothing herein contained shall prevent the court from modifying such judgment or decree as stipulated and agreed in writing by the parties to such action, and in accordance with the terms of such written stipulation and agreement.

NEW JERSEY RULES OF COURT

*** (THIS DOCUMENT IS CURRENT THROUGH MARCH 1, 1995) ***

PART IV. RULES GOVERNING CIVIL PRACTICE IN THE SUPERIOR COURT, TAX COURT AND SURROGATE COURTS
CHAPTER VI. JUDGMENT
RULE 4:50. RELIEF FROM JUDGMENT OR ORDER

N.J. Court Rules, 1969 R. 4:50-1 and 4:50-2 (1995)

4:50-1. Grounds of Motion

On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

4:50-2. Time of Motion

The motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken.

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RULES OF CIVIL PROCEDURE OF
THE DISTRICT COURTS
ARTICLE 7. Judgment

N.M. Dist. Ct. R.C.P. 1-060

Rule 1-060. Relief from judgment or order.

A. Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

B. Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 1-059;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one-year after the judgment, order or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the proceeding for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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*** THIS SECTION IS CURRENT THROUGH CHAPTER 738 APPROVED 8/16/94 ***

CIVIL PRACTICE LAW AND RULES
ARTICLE 50 Judgments Generally

NY CLS CPLR R 5015 (1994)

Rule 5015. Relief from judgment or order

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or

3. fraud, misrepresentation, or other misconduct of an adverse party; or

4. lack of jurisdiction to render the judgment or order; or

5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

(b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

(c) On application of an administrative judge. An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.

(d) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

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THE 1995 SUPPLEMENT ***
*** (1995 REGULAR SESSION) ***

CHAPTER 1A. RULES OF CIVIL PROCEDURE
@ 1A-1. RULES OF CIVIL PROCEDURE
ARTICLE 7. JUDGMENT

N.C. Gen. Stat. @ 1A-1, Rule 60 (1995)

Rule 60. Relief from judgment or order

(a) Clerical mistakes. -- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the court may relieve a party or his

legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) Judgments rendered by the clerk. -- The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law.

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*** (THIS DOCUMENT IS CURRENT THROUGH FEBRUARY 1994) ***

NORTH DAKOTA RULES OF CIVIL PROCEDURE
VII -- JUDGMENT

N.D.R. Civ. P. Rule 60 (1994)

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court: (1) at any time on its own initiative; or (2) on the motion of any party. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the supreme court, and thereafter while the appeal is pending may be so corrected with leave of the supreme court.

(b) Mistakes -- Inadvertence -- Excusable Neglect -- Newly Discovered Evidence -- Fraud -- Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment or order in any action or proceeding for the following reasons: (i) mistake, inadvertence, surprise or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment

has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief from the operation of the judgment. The motion must be made within a reasonable time, and for reasons (i), (ii), and (iii) not more than one year after notice that the judgment or order was entered in the action or proceeding if the opposing party appeared, but not more than one year after a judgment by default has been entered. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except while an appeal from the judgment is actually pending before that court. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule 4(e)(7), or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills or review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment must be by motion as prescribed in these rules or by an independent action.

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OHIO RULES OF CIVIL PROCEDURE
TITLE VII: JUDGMENT

OH Civ. R. 60. (Anderson 1995)

RULE 60. Relief from judgment or order

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged,

or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

OKLAHOMA STATUTES

THIS DOCUMENT IS CURRENT THROUGH THE 1995 SUPPLEMENT (1994 1ST REG. SESSION)

TITLE 12. CIVIL PROCEDURE
CHAPTER 16. VACATION AND MODIFICATION OF JUDGMENTS BY TRIAL COURT

12 Okl. St. @ 1031, 1031.1, 1032, 1033, 1038 (1995)

@ 1031. District court, power to vacate or modify its judgments, when

The district court shall have power to vacate or modify its own judgments or orders within the times prescribed hereafter:

First. By granting a new trial for the cause, within the time and in the manner prescribed in Section 653 of this title.

Second. By a new trial granted in proceedings against defendants constructively summoned, as provided in Section 176 of this title.

Third. For mistake, neglect or omission of the clerk or irregularity in obtaining a judgment or order.

Fourth. For fraud, practiced by the successful party, in obtaining the judgment or order.

Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.

Sixth. For the death of one of the parties before the judgment in the action.

Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

Eighth. For errors in a judgment, shown by an infant in twelve (12) months after arriving at full age, as prescribed in Section 700 of this title.

Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

@ 1031.1. Authorization to correct, open, modify or vacate judgments -- Time -- Notice

A. A court may correct, open, modify or vacate a judgment, decree or appealable order on its own initiative not later than thirty (30) days after the judgment, decree or appealable order prepared in conformance with Section 696.3 of this title has been filed with the court clerk. Notice of the court's action shall be given as directed by the court to all affected parties.

B. On motion of a party made not later than thirty (30) days after a judgment, decree or appealable order prepared in conformance with Section 696.3 of this title has been filed with the court clerk, the court may correct, open, modify or vacate the judgment, decree or appealable order. Where the judgment, decree or appealable order states the matter was taken under advisement, the motion to correct, open, modify, or vacate the judgment, decree or appealable order, if made, must be filed within thirty (30) days from the

date of mailing of a file-stamped copy of the judgment, decree or appealable order to the moving party. The moving party shall give notice to all affected parties. A motion to correct, open, modify or vacate a judgment or decree filed after the announcement of the decision on all issues in the case but before the filing of the judgment or decree shall be deemed filed immediately after the filing of the judgment or decree.

@ 1032. Proceedings to be by motion -- Notice

The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action.

@ 1033. Proceedings by petition, when -- Summons

The proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six, seven, eight and nine of the second preceding section, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action.

@ 1038. Limitations

Proceedings to vacate or modify a judgment, decree or order, for the causes mentioned in paragraphs 4, 5 and 7 of Section 1031 of this title must be commenced within two (2) years after the filing of the judgment, decree or order, unless the party entitled thereto be an infant, or a person of unsound mind and then within two (2) years after removal of such disability. P[illegible]edings for the causes mentioned in

paragraphs 3 and 6 of Section 1031 of this title, shall be within three (3) years, and in paragraph 9 of Section 1031 of this title, within one (1) year after the defendant has notice of the judgment, decree or order. A void judgment, decree or order may be vacated at any time, on motion of a party, or any person affected thereby.

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OREGON RULES OF CIVIL PROCEDURE ANNOTATED

ORCP 71 (1994)

Rule 71. Relief from Judgment or Order

A. CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected as provided in subsection (2) of section B. of this rule.

B. MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE, ETC.

B. (1) By motion. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (c) fraud, misrepresentation, or other misconduct

of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B., and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.

B. (2) When appeal pending. A motion under sections A. or B. may be filed with and decided by the trial court during the time an appeal from a judgment is pending before an appellate court. The moving party shall serve a copy of the motion on the appellate court. The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.

C. RELIEF FROM JUDGMENT BY OTHER MEANS

This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, or the power of a court to grant

relief to a defendant under Rule 7 D.(6)(f) or the power of a court to set aside a judgment for fraud upon the court.

D. WRITS AND BILLS ABOLISHED

Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion or by an independent action.

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH JUNE 1, 1994 ***

PENNSYLVANIA RULES OF CIVIL PROCEDURE
BUSINESS OF COURTS

PA ST RPC Rule 227.1 (1994)

RULE 227.1 POST-TRIAL RELIEF.

(a) After trial and upon the written Motion for Post-Trial Relief filed by any party, the court may

(1) order a new trial as to all or any of the issues; or

(2) direct the entry of judgment in favor of any party; or

(3) remove a nonsuit; or

(4) affirm, modify or change the decision or decree nisi; or

(5) enter any other appropriate order.

Note

The motion for post-trial relief replaces the following motions and exceptions: motion for new trial, motion for judgment notwithstanding the verdict, motion upon the whole record after disagreement of a jury, motion in arrest of judgment, motion to remove a nonsuit, exceptions following the decision of the judge in a trial without jury and exceptions following the adjudication of the judge in an action in equity. However, certain rules retain the filing of

exceptions, e.g., Equity Rule 1530 (exceptions to an auditor's report), Equity Rule 1534 (exceptions to a fiduciary's account), Partition Rule 1569 (exceptions to a master's report) and Divorce Rule 1920.55 (exceptions to a master's report), Support Rule 1910.12(e) (exceptions to a hearing officer's report) and Execution Rule 3136(d) (exceptions to sheriff's schedule of proposed distribution).

(b) Post-trial relief may not be granted unless the grounds therefor,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and

Note

If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief.

(2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

(c) Post-trial motions shall be filed within ten days after

(1) verdict, discharge of the jury because of inability to agree, or nonsuit in the case of a jury trial; or

(2) notice of nonsuit or the filing of the decision or adjudication in the case of a trial without jury or equity trial.

If a party has filed a timely post-trial motion, any other party may file a post-trial motion within ten days after the filing of the first post-trial motion.

Note

A motion for post-trial relief may be filed following a trial by jury, a trial by a judge without a jury in an action at law pursuant to Rule 1038 or a trial by a judge without a jury in an action in equity. A motion for post-trial relief may not be filed to orders disposing of preliminary objections, motions for judgment on the pleadings or for summary judgment, motions relating to discovery or other proceedings which do not constitute a trial. See U.S. National Bank in Johnstown v. Johnson, 506 Pa. 622, 487 A.2d 809 (1985).

A motion for post-trial relief may not be filed in a case stated.

A motion for post-trial relief may not be filed to matters governed exclusively by the rules of petition practice.

The filing of a motion for post-trial relief is prohibited by the following rules: Rule 1557 (order directing partition), Rules 1910.11(k) and 1910.12(g) (orders of support), Rule 1915.10(b) (order of custody, partial custody or visitation), and Rule 1920.55(c) (final decree of divorce based upon a master's report).

(d) A motion for post-trial relief shall specify the relief requested and may request relief in the alternative. Separate reasons shall be set forth for each type of relief sought.

(e) If a new trial and the entry of judgment are sought in the alternative, the court shall dispose of both requests. If

the court directs the entry of judgment, it shall also rule on the request for a new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the request for a new trial.

(f) The party filing a post-trial motion shall serve a copy promptly upon every other party to the action and deliver a copy to the trial judge.

(g) A motion for post-trial relief may not be filed in an appeal from the final adjudication or determination of a local agency or a Commonwealth agency as to which jurisdiction is vested in the courts of common pleas.

NOTE: See 2 Pa.C.S. @ 101 for the definition of "local agency."

(h) A motion for post-trial relief shall be filed following a trial upon an appeal from the decision of viewers pursuant to the Eminent Domain Code.

NOTE: Subdivision (h) eliminates any distinction with respect to the filing of a motion for post-trial relief between jury and non-jury trials following an appeal from the decision of viewers in eminent domain proceedings.

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SUPERIOR COURT RULES OF CIVIL PROCEDURE
VII. JUDGMENT

RI R.C.P. 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of it own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an

adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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RULES OF CIVIL PROCEDURE
VII. JUDGMENT

S.C. Rules of Civil Procedure 60

Rule 60. Relief from Judgment or Order

60(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes.

60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment

has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action or relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The amendment to Rule 60(a) and (b) clarifies that leave of the appellate court is necessary to correct a clerical mistake or to make a motion to set aside an order of judgment while the appeal is pending. An appeal is pending from the time the notice of appeal is served until the issuance of the remittitur. See Rules 203, 204 and 221(b), SCACR.

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*** THIS SECTION IS CURRENT THROUGH
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*** (1995 SEVENTIETH SESSION) ***

TITLE 15. CIVIL PROCEDURE
CHAPTER 15-6. RULES OF PROCEDURE
IN CIRCUIT COURTS
VII. JUDGMENT
15-6-60 -- RELIEF FROM JUDGMENT OR ORDER

S.D. Codified Laws § 15-6-60(a) and (b) (1995)

§ 15-6-60(a). Relief from clerical mistakes

Clerical mistakes in judgments, order or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the settled record is transmitted to the clerk of the Supreme Court and thereafter while the appeal is pending may be so corrected with leave of the Supreme Court.

§ 15-6-60(b). Relief on ground of mistake -- Inadvertence -- Excusable neglect -- Newly discovered evidence -- Fraud

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under § 15-6-59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Section 15-6-60 does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided by statute or to set aside a judgment for fraud upon the court.

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RULES OF CIVIL PROCEDURE

Tenn. Civ. Proc. Rule 60 (1994)

Rule 60 RELIEF FROM JUDGMENTS OR ORDERS

60.01 Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record, and errors therein arising from oversight or omissions, may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

60.02 Mistakes -- Inadvertence -- Excusable Neglect -- Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise

vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

TEXAS RULES OF COURT

*** THIS DOCUMENT IS CURRENT THROUGH JULY 15, 1995 ***

TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 11. TRIAL OF CAUSES

I. REMITTITUR AND CORRECTION
J. NEW TRIALS

TX RCP Rule 316, 320, 321, 322, 329b (1995)

RULE 316. CORRECTION OF CLERICAL MISTAKES IN JUDGMENT RECORD.

Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion therefor has been given to the parties interested in such judgment, as provided in Rule 21a, and thereafter the execution shall conform to the judgment as amended.

RULE 320. MOTION AND ACTION OF COURT THEREON.

New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large. When it appears to the court that a new trial should be granted on a point or points that affect only a part of the

matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested. Each motion for new trial shall be in writing and signed by the party or his attorney.

RULE 321. FORM.

Each point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.

RULE 322. GENERALITY TO BE AVOIDED.

Grounds of objections couched in general terms--as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like--shall not be considered by the court.

RULE 329b. TIME FOR FILING MOTIONS.

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

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UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT.

URCP Rule 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct

of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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RULES OF CIVIL PROCEDURE
VII. JUDGMENT

V.R.C.P. 60 (1994)

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court, and thereafter while the appeal is pending may be so corrected with leave of the Supreme Court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an

adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review are abolished as means of reopening judgments entered under these rules, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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*** THIS SECTION IS CURRENT THROUGH
THE 1995 SUPPLEMENT ***
*** (1995 REGULAR SESSION) ***

TITLE 8.01. CIVIL REMEDIES AND PROCEDURE
CHAPTER 17. JUDGMENTS AND
DECREES GENERALLY
ARTICLE 1. IN GENERAL

Va. Code Ann. @ 8.01-428 (1995)

@ 8.01-428. Setting aside default judgments; clerical mistakes; independent actions to relieve party from judgment or proceedings; grounds and time limitations

A. Default judgments and decrees pro confesso; summary procedure. --Upon motion of the plaintiff or judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.

B. Clerical mistakes. --Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court.

C. Failure to notify party or counsel of final order. --If counsel, or a party not represented by counsel, who is not in default in a circuit court is not notified by any means of the entry of a final order and the circuit court is satisfied that such lack of notice (i) did not result from a failure to exercise due diligence on the part of that party and (ii) denied that party an opportunity to file an appeal therefrom, the circuit court may, within sixty days of the entry of such order, grant the party leave to appeal. The computation of time for noting and perfecting an appeal shall run from the entry of such order, and such order shall have no other effect.

D. Other judgments or proceedings. --This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in @ 8.01-322, or to set aside a judgment or decree for fraud upon the court.

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STATE RULES
PART IV: RULES FOR SUPERIOR COURT
SUPERIOR COURT CIVIL RULES (CR)
7. JUDGMENT (RULES 54-63)

Wash. CR 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

Comment by the Court

Subdivision (a) follows FRCP 60(a) and supersedes RPPP 60.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

Comment by the Court

Subdivision (b) follows FRCP 60(b), except that paragraph (2) and paragraphs (7) through (10), and part of paragraph (1), have been added from RCW 4.72.010. The last sentence of FRCP 60(b) has been separated into subdivisions (c) and (d), respectively. Subdivision (b) supersedes RCW 4.32.240, 4.72.010, 4.72.020, 4.72.030, and 4.72.040, to the extent that those sections cover relief from judgments.

(c) Other remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs abolished -- Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Comment by the Court

Subdivision (d) follows the last sentence of FRCP 60(b).

(e) Procedure on vacation of judgment. (1) Motion. Application shall be made by motion filed in the cause

stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such times may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

Comment by the Court

Subdivision (e) follows and supersedes RPPP 60.04W and RCW 4.72.040. Reference to "petition" in RCW 4.72.050 is superseded. RCW 4.32.240 is superseded.

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*** (THIS DOCUMENT IS CURRENT THROUGH FEBRUARY 1, 1994) ***

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD
CHAPTER VII. JUDGMENT.

WVa. R.C.P., Rule 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. -- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to

move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than eight months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

WISCONSIN STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH ALL 1994 LEGISLATION ***

CIVIL PROCEDURE
CHAPTER 806. CIVIL PROCEDURE -- JUDGMENT

Wis. Stat. @ 806.07 (1994)

806.07 Relief from judgment or order

(1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub.

(1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

WYOMING COURT RULES ANNOTATED
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*** (THIS DOCUMENT IS CURRENT THROUGH DECEMBER 1994) ***

WYOMING RULES OF CIVIL PROCEDURE
VII. JUDGMENT

W.R.C.P., Rule 60 (1994)

Rule 60. Relief from judgment or order.

(a) Clerical Mistakes. -- Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court, and thereafter while the appeal is pending may be so corrected with leave of the Supreme Court.

(b) Other reasons. -- On motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding as provided by statute, or to grant relief to a party against whom a judgment or order has been rendered without other service than by publication as provided by statute. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

OHIO RULES OF CIVIL PROCEDURE

RULE 41. DISMISSAL OF ACTIONS.

(A) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

OHIO REVISED CODE § 2305.19

2305.19 Saving in case of reversal

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. If the defendant is a corporation, foreign or domestic, and whether its charter prescribes the manner and place, or either, of service of process thereon, and it passes into the hands of a receiver before the expiration of such year, then service to be made within the year following such original service or attempt to begin the action may be made upon such receiver or his cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of such agents or officers of the receiver with the person having charge thereof. If such corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no such agent, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on such defendant.

Supreme Court, U.S.
FILED
JAN 25 1996

NO. 95-1044

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Norfork And Western Railway Company
and Norfolk Southern Corporation

Petitioners

v.

Roosevelt Cerney

Respondant

RESPONDANT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

THOMAS J. ESCOVAR (#0011532)
COUNSEL OF RECORD
STEUER, ESCOVAR & BERK CO., L.P.A.
55 Public Square, Suite 1828
Cleveland, Onio 44113
(216) 771-8121

PETER H. WEINBERGER (#0022076)
SPANGENBERG, SHIBLEY, LANCIONE & LIBER
2400 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3400
Attorneys for Petitioners

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STATEMENT OF THE CASE

Respondant, Roosevelt Cerney, was an employee of Petitioners, Norfolk and Western Railway and Norfolk and Southern Corporation (hereinafter jointly known as "Norfolk"). On or about August 9, 1988, while acting within the course and scope of his regular employment with Norfolk, Mr. Cerney was operating a track sweeper. Because of Norfolk's negligent maintenance of both the track sweeper and the railroad tracks it traveled on, the track sweeper Mr. Cerney was operating derailed and threw Mr. Cerney to the ground, causing him to sustain serious and debilitating injuries.

Mr. Cerney brought this action on August 8, 1990, pursuant to the Federal Employer's Liability Act (hereinafter "FELA"), 45 U.S.C. §51, to recover for the aforementioned personal injuries he sustained as the result of Norfolk's negligence. This lawsuit was assigned the Case Number 194859 in the Court of Common Pleas, Cuyahoga County, Ohio.

For approximately two years, the parties to this lawsuit actively negotiated to reach a settlement. On July 23, 1992, when it became clear that a settlement could not be reached prior to the set trial date of August 11, 1992, Cerney's counsel of record, Peter Weinberger, filed an uncontested Motion for Continuance. At a pretrial conference on August 4, 1992, Judge Bert Griffin denied the Motion for Continuance solely on the grounds that the Rules of Superintendence prohibited cases from remaining on the docket for more than two

years; however, Judge Griffin informed Mr. Cerney's counsel that the option to voluntarily dismiss the case without prejudice, while retaining the option to refile within one years time, under Ohio Civil Rule 41 (A), did exist. (See, Ruling and Opinion on Plaintiff's Motion for Relief from Judgment). Pursuant to the court's suggestion, Respondant Cerney, then filed a notice of voluntary dismissal on August 10, 1992.

Once again, the parties vigorously attempted to settle the case. When it again became clear that settlement could not be reached, Cerney refiled his complaint on August 6, 1993. The refiled complaint was assigned Cuyahoga County, Court of Common Pleas Case Number 256351. Norfolk then filed a motion to dismiss the refiled complaint, asserting that the refiled complaint was outside of the three year FELA statute of limitations as found in 45 U.S.C. §51.

Respondant Cerney, then filed a Motion for Declaratory Judgement seeking to have the voluntary dismissal void ab initio. The trial court denied Cerney's Motion for Declaratory Judgment and granted Norfolk's Motion to dismiss the refiled complaint with prejudice.

In order to vacate the voluntary dismissal of his original FELA complaint which was timely commenced, on February 25, 1994, Cerney filed a Motion for Relief from Judgment, pursuant to Ohio Civil Rule 60 (A) and (B). On July 1, 1994, the trial court ruled Ohio Civil Rule 60 (A) to be inapplicable, but granted the motion based on Ohio Civil

Rule 60 (B) (5). Id. at p.3. Thus, Cerney's voluntary dismissal of his original complaint which was timely filed was vacated.

All of the parties to the lawsuit appealed to the Eighth District Appellate Court. Respondant Cerney, appealed the granting of the Motion to Dismiss his refiled complaint, and Norfolk, appealed the granting of Cerney's Motion for Relief from Judgment.

The Eight District Appellate Court held that the granting of Norfolk's Motion to Dismiss the refiled complaint was proper because Cerney's refiled complaint was outside of the three year FELA statute of limitations and because Cerney could not offer any affirmative evidence that Norfolk equitably estopped themselves from asserting that the statute of limitations had run. The appellate court further held that the trial court did not abuse its discretion in granting Cerney's Motion for Relief from Judgment from his Voluntary Dismissal. The appellate court held that there was no intent on the part of Cerney to circumvent the statute of limitations. Furthermore, the appellate court noted that prior to the pretrial of August, 4, 1992, neither party anticipated filing a Notice of Voluntary Dismissal, and that it cannot be ignored that the initial suggestion to make said dismissal was made by the trial judge, for reasons that had to do with the court's docket rather than any issue in the case or because of the actions of the parties or their respective attorneys. The appellate court held that the trial court acted in

the interests of fairness and justice, and did not abuse its discretion in doing so. (Court of Appeals Judgment Entry, pp.10-12)

Petitioners Norfolk then sought further review of the Eighth District Appellate Court's Decision affirming the order of relief from judgment by filing a Notice of Appeal and A Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. The Supreme Court of Ohio denied jurisdiction on October 4, 1995.

The Petitioners Norfolk now seek further review of the Cuyahoga County Court of Common Pleas granting of Cerney's Motion for Relief from Judgment by their Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

The Supreme Court of the United States should deny the Petitioners' request for a writ of certiorari for the reason that the relief from judgement granted by the trial court which vacated Respondant Cerney's voluntary dismissal of his original timely filed complaint was a valid procedure that does not directly challenge or contravene any Federal Legislation, The Supremacy Clause of the United States Constitution, or Supreme Court Precedent.

When FELA cases are tried in state court, they are subject to state procedural rules and federal substantive rules. ***St Louis Railway Co. v. Dickerson***, 470 U.S.C. 409, 411 (1985). Accordingly, The trial court granted

Cerney relief from judgment from his voluntary dismissal of his original complaint (case no. 194859) pursuant to Ohio Rule of Civil Procedure 60 (B) (5) for reasons of judicial fairness and equity. When the court granted such relief, as it is entitled to so do under state and federal law, Cerney remained in court on his original complaint which was timely filed within the FELA statute of limitations. Thus, said relief from judgment does not involve the Ohio Savings statute and poses absolutely no threat to the uniformity of Federal Legislation, The Supremacy Clause of the United States Constitution, or Supreme Court Precedent.

I. The trial court's order granting relief from judgment under Ohio Rule of Civil Procedure 60 (B) was proper because that action is authorized by Federal Law and that action is not, in any way, in contravention to Federal Law, The Supremacy Clause of The United States Constitution, or the Supreme Court Precedent found in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

The trial court properly granted Cerney relief from judgment from his voluntary dismissal of his original complaint. It is well established federal and state law that when a federal case is being tried in state court, the trial court is to apply state procedural rules and federal substantive rules. ***St Louis Southwestern Railway Co. v. Dickerson*** 470 U.S. 409, 411 (1985). See also, ***Norfolk***

& Western Railroad Co. v. Liepet, 444 U.S. 490, 493 (1980).

An order granting Relief from judgment is procedural. See Federal Rule of Civil Procedure 60 and Ohio Rule of Civil Procedure 60. **See also,** Petitioners' appendix which includes **state procedural** rule 60 from 49 states that also govern Relief from Judgment.) Since relief from judgement is procedural, a state trial court hearing a federal case may grant relief from judgment under a state's Civil Rule of Procedure 60 (B), as the trial court did in this case. As the trial court was authorized by federal law to grant Cerney relief from judgment, the trial court's use of Ohio Civil Rule of Procedure 60 (B) (5) to reinstate Cerney's original complaint that was timely filed was valid.

As a matter of fact, Petitioners' Norfolk have not argued that the trial court's use of Ohio Rule of Civil Procedure 60 (B) was improper procedurally. Petitioners simply argue that the use of rule 60 (B) will act as a substitute for the state savings clause and create a lack of uniformity in the FELA statute of limitations found in 45 U.S.C. §51; however, this assertion is purely fictitious for the following reasons: 1) The order granting relief from judgment under Ohio Civil Rule 60 (B)(5) did not produce a result inconsistant with that which could have been achieved under Federal Rule 60 (B)(6); and 2) the order granting relief from judgment does not extend the FELA statute of limitations.

II. The language and policy of Ohio Rule of Civil Procedure 60 (B) (5) are directly derived from Federal Rule of Procedure 60 (B) (6), thus an order granting relief from judgment pursuant to Ohio Rule of Civil Procedure 60 (B) (5) is consistant with the result that would be achieved under Federal Rule of Civil Procedure 60 (B) (6) and thus no lack of uniformity exists.

The language and policy of Ohio Rule of Civil Procedure 60 (B) (5) is derived from Federal Rule Of Civil Procedure 60 (B) (6). ***Celina Mutual Ins. Co. v. D'agostino*** (1971), 31 Ohio Misc 21. Both rules share similar language which allows a party to seek relief from judgment within a reasonable time for reasons not enumerated in (B) (1), (2), or (3). Both the Ohio and Federal Rules of Civil Procedure strictly limit the application of Rule 60 (B) (5) and Rule 60 (B) (6) respectively to circumstances that do not qualify under Rule 60 (B) (1), (2), or (3) or to situations that have extraordinary situations which would additionally qualify for relief under the Ohio Rule 60 (B) 5 or Federal Rule 60 (B) (6) provision. *Id.* See also, ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847 (1988). This is true so that a party may not circumvent the one year time limit applicable to Rule 60 (B) (1), (2), or (3) by simply requesting relief under the catch all provision.

In accordance with the restrictive policy of both the Ohio and Federal Rules, the trial court in the case at bar

granted relief from judgment under Ohio Rule 60 (B) (5). The trial court did not grant relief from judgment simply because Cerney did not file his motion for relief within the one year's time period mentioned in Rule 60 (B) (1), (2), or (3), but rather granted the motion under Ohio Rule 60 (B) (5) because of the extraordinary circumstance that it was the trial judge whom suggested that the plaintiffs dismiss their complaint so that the court could comply with the local rule of superintendence which required all court cases to be off of the docket before two years time. The trial court determined that this extraordinary circumstance qualified as a situation where relief from judgment under Ohio Rule 60 (B) (5) was appropriate. The appellate court affirmed that there were extraordinary circumstances that justified relief under Ohio Rule 60 (B) (5) and the Supreme Court of Ohio declined jurisdiction.

The trial court adhered to both the Ohio and Federal policies restricting the use of the catch all provision of 60 (B) and thus any decision rendered under Ohio Rule 60 (B) (5) will not create a result which could not occur under Federal Rule 60 (B) (6), thus uniformity exists and petitioners arguments fail.

Furthermore, contrary to petitioners' arguments, a state's granting of relief from judgment will not create a lack of uniformity in federal law. Petitioner's arguments that the state's relief from judgment provisions will have the same effect as the state savings statutes is clearly wrong. A

state order granting relief from judgment could never have the same effect as a State Savings Clause, as the petitioner argues, because they are two entirely different vehicles. A state savings clause strikes at the heart of the federal statute of limitations by guaranteeing the claimant the right to refile his complaint within a certain period of time. Thus, the state savings statute would automatically extend the FELA federal statute of limitations by whatever period of time the state savings statute called for. Hence there would not be any discernable federal statute of limitations. Automatically extending the FELA statute of limitations by various state rule with different time extensions is what *Burnett* sought to avoid. Thus, the *Burnett* court held that the State Savings Statute did not apply to FELA actions because of the great lack of uniformity it would create. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424

However, a state rule of procedure allowing relief from judgment does not guarantee a claimant anything. A relief from judgment is not a right guaranteed to claimants, it is a ruling which is handed down through judicial determination based upon the equities in a case. A state savings statute does not require a judicial determination to take effect whereas a relief from judgement does. A relief from judgment will only take effect when the equities in a case require. Thus a relief from judgement falls directly in line with the Supreme Court's rationale in *Burnett v. New York*

Central Railroad Co., in that it does not operate to extend the FELA statute of limitations. Thus an order granting relief from judgment under a state rule of procedure 60 (B) could never produce the lack of uniformity the Supreme Court of the United States sought to avoid in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

III. The trial court's order granting Cerney relief from judgment which vacated his voluntary dismissal of his original timely filed complaint will not create a lack of uniformity in the FELA statute of limitations, and as such, said order is not in violation of federal law, the Supremacy Clause of the United States Constitution, or Supreme Court Precedent.

The trial court's order granting Cerney relief from judgment reinstated his original complaint which was timely filed, and thus the order granting relief from judgment does not increase the FELA statute of limitations or create a lack of uniformity in the federal statute of limitations.

The order granting Cerney relief from judgment relieved Cerney of the voluntary dismissal of his original complaint.[1] Thus, the order granting

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[1] Cerney voluntarily dismissed his original complaint because of a recommendation by the trial judge based on factors involving the courts docket rather than any issue in the case or because of the actions of the parties or

relief from judgment reinstated Cerney's original complaint which was filed on August 8, 1990. The original complaint was timely filed within the three year FELA statute of limitations, as the date of the alleged negligence that formed the basis of said complaint occurred on August 9, 1988. Thus, the relief from judgment did not extend the time period Cerney had to file his complaint under FELA. Actually, Cerney filed his original complaint a full year before the FELA three year statute of limitations would have run. Thus, the relief from judgment did not extend the Statute of limitations applicable to FELA actions, does not create a lack of uniformity, and does not challenge either the Supremacy Clause of the United States Constitution or the Supreme Court Precedent of ***Burnett v. New York Central Railroad Co.***, 380 U.S. 424 (1965).

In the alternative, if this court finds that the order granting relief from judgment did extend the three year FELA statute of limitations, then the extension qualifies as an equitable extension of the FELA statute of limitations authorized by Supreme Court Precedent. ***Burnett v. New York Central Railroad Co.***, 380 U.S. 484, 426-427 (1985); ***Glus v. Brooklyn Eastern Terminal***, 359 U.S. 231 (1959); ***Osbourne v. United States***, 164 F.2d 767 (C.A.2d Cir. 1947); ***Scarborough v. Atlantic Coast Line Railroad Co.***, 178 F.2d 253

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their respective attorneys. See statement of Case.

(C.A.4th Cir 1949); *Frabutt v. New York*, 84 F. Supp 460 (D.C.W.D.Pa. 1949).

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 484, 426-427 (1965), the court held that the FELA statute of limitations is not totally inflexible, and that it may be extended for certain equitable reasons as long as the congressional intent behind the statute of limitations is not circumvented.

The *Burnett* Court determined that the congressional intent behind the FELA statute of limitations is to ensure fairness to defendants by not allowing plaintiffs to "sleep on their rights" by not prosecuting their actions or by letting the actions slumber until evidence has been lost and memories have faded. *Id.* However, the court also stated that this intent is frequently outweighed where justice requires the vindication of plaintiff's rights. *Id.*

Several cases have held that when a plaintiff has not slept on his rights or slumbered, equitable bases for extending the FELA statute of limitations may be present. These equitable bases generally fall into two categories: 1) where the plaintiff diligently pursues his rights under FELA but misses the statute of limitations due to extenuating circumstances (See *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965); or 2) the conduct of the defendant results in plaintiff's failure to bring his action. (See *Glus v. Brooklyn East District Terminal*, 359 U.S. 231 (1959).

Several cases have found equitable

circumstances which do not frustrate the congressional intent of the statute of limitations to require extending the statute of limitations. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). See also, *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Osbourne v. United States*, 164 F.2d 767 (C.A.2d Cir. 1947); *Scarborough v. Atlantic Coast Line Railroad Co.*, 178 F.2d 253 (C.A.4th Cir 1949); *Frabutt v. New York*, 84 F. Supp 460 (D.C.W.D.Pa. 1949).

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 432-434 (1965), the court held that where the plaintiff had timely brought his action in a state court having jurisdiction, and served process upon the defendants, yet his case gets dismissed due to improper venue, his subsequent filing in Federal Court which took place after the expiration of the statute of limitations will still be valid.

In *Burnett*, the plaintiff timely filed his FELA action in a state court which had jurisdiction over the matter involved. The plaintiff also obtained service of process over the defendants. However, the plaintiff's case was dismissed because Ohio Revised Code §2307.37 stated that a case for personal injury against a railroad may only be brought in the county where the plaintiff resides. The plaintiff did not reside in the county where he brought the suit and the suit was dismissed.

After the state filing was dismissed, Burnett filed an action in federal court pertaining to the same

injuries. Although the forum was correct the filing was beyond the three year statute of limitations and thus his federal filing was also dismissed. This court held that where the plaintiff has properly prosecuted his action in state court and his case is dismissed because of lack of venue, the statute of limitations may be extended or tolled, and thus his subsequent federal filing will be considered timely. The court expounded by saying that the plaintiff in that case did not sleep on his rights, but rather timely brought the action in state court of competent jurisdiction only to have it dismissed. Thus, the defendants could not rely on the statute of limitations since the congressional intent of the statute of limitations was met because the defendants were aware that the plaintiff was pursuing his rights.

The case at bar is remarkably similar to the ***Burnett*** case. In the case at bar, the relief from judgment granted by the trial court constitutes an equitable exception to the FELA statute of limitations.

Similar to the plaintiff in ***Burnett***, Cerney timely filed his action in a state court of competent jurisdiction. Furthermore, in the case at bar, Cerney had diligently prosecuted his claim, serving discovery on the Petitioners and achieving a settlement offer of One Hundred Thousand Dollars ($100,000.00). Also similar to the plaintiff in ***Burnett***, Cerney faced the possibility of being precluded from fully prosecuting his action because of an

inequity. In *Burnett*, the inequity was that the timely filed state action was dismissed due to improper venue; whereas in the case at bar the complaint was voluntarily dismissed according to the recommendation of the trial judge based on reasons concerning the courts docket rather than any action of the parties or their respective attorneys.

As the court in *Burnett* found there was a gross injustice and inequity which would operate to preclude the plaintiff from continuing to prosecute his timely filed state action, the trial court in this case also saw an injustice. The injustice that Respondant Cerney would not be able to fully prosecute his FELA action which was timely filed in state court because he followed the recommendations of the trial judge. The same equitable principles present in *Burnett* which caused the United States Supreme Court to allow a filing past the statute of limitations are present in the case at bar. Thus, the order granting relief from judgment by the trial court was in direct compliance with currently existing federal legislation allowing extensions to the flexible FELA three year statute of limitations. Hence, the order granting relief from judgment does not create any lack of uniformity which the Supreme Court of the United States has not previously authorized.

CONCLUSION

The trial court's order granting Cerney relief from judgment of his voluntary dismissal of his original complaint was a valid procedure which will not create a lack of uniformity in a federal FELA statute of limitations, thus the United Supreme Court should deny the Petitioners' request for a writ of certiorari.

Respectfully submitted,

THOMAS J. ESCOVAR (#0011532)
COUNSEL OF RECORD
STEUER, ESCOVAR & BERK CO., L.P.A.
55 Public Square, Suite 1828
Cleveland, Ohio 44113
(216) 771-8121

PETER H. WEINBERGER (#0022076)
SPANGENBERG, SHIBLEY, LANCIONE & LIBER
2400 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3400
Attorneys for Petitioners

APPENDIX

STATE OF OHIO	)	IN THE COURT OF
	)SS:	COMMON PLEAS
CUYAHOGA COUNTY	)	CASE NO. 194859
ROOSEVELT CERNEY,	)	
	)	
Plaintiff	)	
	)	**RULING AND OPINION**
vs.	)	**ON PLAINTIFF'S**
	)	**MOTION FOR RELIEF**
NORFOLK AND WESTERN RAILWAY CO., et al.,	)	**FROM JUDGMENT**
	)	
Defendants	)	

Burt J. Griffin. J.:

Plaintiff moves, pursuant to Ohio Civil Rule 60 (B) (4) and (5), to vacate the judgment entry of voluntary dismissal dated August 27, 1992 resulting from plaintiff's own notice of voluntary dismissal dated August 10, 1992. The judgment of dismissal provided that the case was dismissed with "intent...to permit plaintiff to refile the matter within one year..." although the dismissal became effective with the filing of the notice of dismissal.

Plaintiff's cause of action allegedly arose on August 9, 1988. He filed his complaint for personal injuries on August 8, 1990.

The voluntary dismissal resulted because plaintiff had retained new counsel to try his case; new counsel desired time for additional discovery; and the court was unwilling to grant a further continuance beyond the two-year limit for concluding cases established by

the Rules of Superintendence. Such a continuance would have allowed plaintiff's case to retain priority on the Court's docket ahead of cases that had been more diligently prepared.

The parties, counsel, and the court believed that a voluntary dismissal by plaintiff would allow plaintiff to refile his case within a year and that his case would take its place on the Court's docket behind cases that had been filed earlier than plaintiff's refiling. No one at that time was aware that the Federal Employer's Liability Act precluded refiling because the statute of limitations had expired. On February 15, 1994, the Court granted defendant's motion to dismiss the refiled case, No. 256351, because of the United States Supreme Court's ruling on the right to refile FELA cases. See Court's opinion, *Roosevelt Cerney v. Norfolk & Western Railway Co., et al.*, Cuyahoga County Common Pleas Court Case No. 256351, unreported opinion (February 15, 1994). Plaintiff, thereafter, on February 25, 1994, filed this motion to vacate the judgment of dismissal in Case No. 194854.

If any relief is available to plaintiff it must be under Civil Rule 60 (B) (4) or (5). Rule 60 (A) Clerical Mistake does not apply since the error in this case was an error of judgment by plaintiff's counsel. See *Dentsply International Inc. v. Kostats*, 26 Ohio App.3d 116 (Cuyahoga County, 1985); Wright & Miller, Federal Practice and Procedure, §2854, p. 149 (1977). The motion cannot be considered under Rule 60 (B) (1), (2) and (3) because it was not filed within the one-year time limit

applicable to those subsections.

Whether this motion should be deemed to be governed only by Rule 60 (B) (1), (2), (3) and thus be precluded or is cognizable under Rule 60 (B) (5) depends on how one views the central facts giving rise to the dismissal. There can be no doubt that a central reason for plaintiff's voluntary dismissal was a mistake in judgment by plaintiff's counsel and inadequate preparation by plaintiff's original counsel.

Plaintiff's original counsel was not prepared to try the case on the date set for trial and secured new counsel for the plaintiff. New counsel believed not only that he needed more time for preparation but also that additional discovery was necessary. When the court would not permit a continuance of trial, counsel for the plaintiff dismissed the case in the mistaken belief that the Ohio Savings Statute would permit refiling within a year. The denial of the continuance was based upon the Court's insistence that the time deadlines of the Rules of Superintendence be observed.

Although inadequate preparation by original counsel was the underlying cause of the need to dismiss, the remaining decisions reflected a desire by plaintiff's counsel to be diligent. None of the plaintiff's loss of his right to a trial stems from a judgment about the merits of his case. Rather, issues of court management and lawyer performance have caused him to suffer.

It is not the purpose of the Rules of Superintendence to deny party a hearing on the merits of his case. Only the most extreme or repeated lawyer

misconduct should ordinarily justify a dismissal for procedural reasons that prevents a refiling and hearing on the merits. There is no question that plaintiff's voluntary dismissal was an act of procedure that was intended ultimately to secure a hearing on the merits, if necessary.

Accordingly,[1] since the only purpose of the court in denying a motion for continuance of the trial and bringing pressure on plaintiff's counsel to dismiss was to deny plaintiff priority on the Court's calendar, plaintiff has demonstrated a reason under Civil Rule 60 (B) (5) to vacate the dismissal. The motion to vacate is granted on the condition that plaintiff pay to defendants all expenses of this litigation reasonably incurred by them since August 10, 1992 that relate to all of plaintiff's claim or the vacating of this dismissal order.

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1. The court is satisfied that plaintiff's claim has sufficient merit to proceed to trial since defendant never successfully filed a motion for summary judgment.

Pretrial conference is set for 10/03/94 at 2:30 p.m. Trial is set for 11/14/94 at 9:00 a.m. All discovery shall be completed prior to the pretrial conference.

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

Date: July 1, 1994

CERTIFICATE OF SERVICE

A copy of the foregoing Ruling and Opinion has been forwarded by Regular U.S. Mail this 1st day of July, 1994, to:

Peter Weinberger, Esq.
2400 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3400
Attorney for Plaintiff

Thomas J. Escovar, Esq.
55 Public Square
Ste. 1828
Cleveland, Ohio 44113
Attorney for Plaintiff

Forrest Norman, Esq.
Bulkley BUilding, 7th Floor
1501 Euclid Avenue
Cleveland, Ohio 44115
Attorney for Defendant

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

OHIO RULE OF CIVIL PROCEDURE 60

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(A) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other

reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or take. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

FEDERAL RULE OF CIVIL PROCEDURE 60

RULE 60. Relief from Judgment or Order
(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have ben discovered in time to move for a new trial under Rule 59 (B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief

from the operation of a judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.